United States Court of Appeals

for the Second Circuit

APPENDIX

74-2116

United States Court of Appeals

For the Second Circuit.

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

On Appeal From The United States District Court For The Southern District of New York

JOINT APPENDIX

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FILED
OCT 24 1974

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

-and-

BROTHERHOOD OF NEW YORK STATE CORRECTION OFFICERS, INC.,

Plaintiffs,

-against- 73 Civ. 1548

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES:

RUSSELL OSWALD, individually and in his capacity of Commissioner of the New York State Department of Correctional Services;

THE NEW YORK STATE CIVIL SERVICE COMMISSION:

ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner;

MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants.

- -x

New York, New York
July 23, 1973
10:15 A.M.

B e f o r e:

HON. MORRIS E. LASKER, District Judge.

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to the plaintiffs' case and to hear the first witness at this time.

MR. BALLER: Your Honor, if I may just say a few words before proceeding to the evidence.

I don't want to make a pretrial statement on the facts and law but simply state that we will attempt to shorten and clarify the proceedings as much as possible and I think we can do it with a short statement.

As your Honor knows from the pretrial briefs, there are a number of legal issues between the parties. I can think of at least six major ones, including whether the class action is maintainable, whether the court can grant relief from the present effects of past discriminatory examinations, whether there is a statute of limitations or laches bar here and the question of whether affirmative remedies and costs are now appropriate.

I would suggest that these are basically legal issues which can be resolved better after trial and upon the evidence and we will attempt not to argue these issues at this time but be happy to brief them for your Honor if you choose.

THE COURT: I think clearly the majority of the issues that you mentioned and which do result from differences in the briefs can be decided as legal questions and the only one that requires any comment from me at this time,

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it seems to me, is the question -- are the questions raised in the defendants' brief as to whether certain matters were appropriately assailable, particularly past examinations.

I think I do have to reach some kind of conclusion on that because it will affect the evidence that you will be permitted to put in.

Now, I have reached a tentative conclusion, but I am prepared to hear argument, if necessary. My tentative conclusion is that the defendants are incorrect in the view there because I think their position is falsely premised. I would agree with them that if the plaintiff were attacking the validity of the old tests at the present time that it would be a very significant question as to whether the statute of limitations had run.

However, as I understand it, the defendants are not attacking the validity of the old tests-- I don't know if they are in use any more -- but proposes simply to put in evidence as to the old tests before me as evidence of whether there is a pattern here which requires or merits relief from the court.

Under those circumstances, I don't see how the statute of limitations applies any more than the statute of limitations would apply to somebody's former automobile accident if it was evidence or proposed as evidence of

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his tendency toward negligent driving. That may not be the best example in the world.

Mrs. Gordon, since that ruling or tentative ruling adversely affects you, do you want to make any further comment on that point?

MRS. GORDON: Your Honor, we provided some statistical data to the plaintiffs' attorneys. We expressly stated at that time we had no objection to the court or the plaintiffs using this type of data to place the case in context. In other words, I agree with your Honor -- I have no objection to your Honor reviewing that type of material.

However, it is plain from plaintiffs' pretrial specification that they plan to infer from the use of that statistical data that prior examinations, particularly in the sergeant title, were not job related.

Now, once you get to that stage, the attempt to draw that inference, the burden under the law that your Honor has noted switches to the defendant to show that the examination was in fact job related.

Now, we are prepared to show that Examination 34944 was job related, and we have done full discovery, I believe, in that area. We are not and could not be, either in the time permitted to develop the case or in the time for trial, obliged to show that prior examinations were job related.

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Now, if your Honor sincerely believes or plaintiffs already have contended, if your Honor agrees that the job relatedness of prior examinations is an issue, we would undertake to prove their job relatedness at some date set by the court, but we can't do it within the time allocated, nor have we had any discovery going to the job relatedness of those examinations. All we have provided is certain summary data and a brief description from which we think it is wholly improper to infer anything about the job relatedness.

THE COURT: Or the propriety is something that will come later. While I am speaking, I ask you not to interrupt during the course of the trial.

I myself, of course, would much prefer if I were able to decide this case one way or the other based on 34944 alone because the less material I have to deal with the simpler it is for me personally.

May I have your attention, Mr. Baller?

MR. BALLER: I am sorry.

THE COURT: Did you hear my most recent remarks? I said I would prefer if I could decide on the basis of one test. The point that I was making before was not based on my preference or anything else but on whether I thought that the plaintiffs, if they proposed to put in this other

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material, had a legal right to do so. I would hope that you proceed primarily with regard to proof as to 34944 and then let us recanvass the situation and see whether it really is necessary to go into the history or merits of the earlier tests. I understand that I am not being asked to rule on the other tests but simply being asked to take them into consideration in determining how the rights of the plaintiffs have been affected. I hope we can avoid that spread because I do think it is going to considerably enlarge the scope of the trial.

MR. BALLER: We will proceed in that way, your Honor. I think the question may arise in some specific context.

There are two other issues I would like to mention here because I think they will simplify the proceedings. There is a large issue framed as to whether the plaintiff Brotherhood of New York State Correction Officers is properly a plaintiff and can properly represent members of the class. I think that we can simplify that issue by stating that we are willing and, indeed, desire to withdraw the Brotherhood of New York State Correction Officers as a plaintiff. I think as a practical matter their presence or absence makes little difference in the case and it would simplify proceedings, and so we are now moving that they be

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allowed to withdraw as plaintiff, leaving just plaintiffs Hayes and Kirkland.

THE COURT: I assume the plaintiff does not object since they raised the point themselves. The motion is granted.

I take it you represent the Brotherhood and the individual plaintiffs.

MR. BALLER: That is correct.

There is an issue as to whether plaintiffs should be allowed to put in evidence as to the disparity impact of previous correction officer examinations as opposed to correction sergeant examinations. We do not intend to present evidence as to past correction officer examinations. So that issue which was specified in our pretrial brief will be withdrawn. I believe on that point we can simplify proceedings also.

A lot of our evidence will be in the nature of documentary and statistical proof, particularly on the questions of racial and ethnic composition of certain jobs and on the impact of primarily the most recent sergeant's examination, but to some extent one previous one. We would propose to put that in directly. I really don't think there is much question of authenticity in regard to a lot of the documents and we will try to do that as expeditiously as

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possible.

THE COURT: When you do put in documents, though, I would appreciate your taking a moment or two to bring to my attention whatever you consider to be the salient features of the document so I don't have to dope it out myself upstairs six weeks after I last saw you or heard you talk.

MR. BALLER: Fine. We would be happy to do that. In fact, at this time we are ready to proceed. I think the most expeditious way to proceed would be to begin by putting in our documents so that we can have them before you. We will be referring to them continuously during the testimony.

MRS. GORDON: If I may comment on that.

Mr. Baller and I had a discussion and we agreed no document will require a foundation and we assume that goes both for plaintiffs and defendants.

It might help the court if we simply marked all the documents in evidence at this time with the exhibit numbers designated by plaintiffs and defendants and then we won't have any problems as we go through the procedure. I would be very agreeable to that.

MR. BALLER: That is not quite our position. We don't question the authenticity of any documents. Some of them, however, do not speak for themselves, seem to be unclear, and before they are admitted into evidence we would

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like the opportunity to question a witness about what the documents say. I think we are prepared to let most of them in directly.

THE COURT: Mrs. Gordon, I don't think we should have any problem about that, because even if the parties stipulate it is relevant, if I don't think it is relevant it won't be relevant.

What Mr. Baller has suggested is perfectly proper. There won't be a question it is an authentic document and on the whole you won't interfere with each other. But if one of you think a paper is not competent or it has nothing to do with the point, I don't see why that party shouldn't be able to bring that to my attention.

MR. BALLER: At this point, your Honor --

THE COURT: But marking exhibits for identification is something else.

Let me make this suggestion, that is, at least at the present time all of the plaintiffs' exhibits be marked for identification. That doesn't mean the defendants won't in due course but they are not going to be presenting any at the moment, I suppose. Then we will get going. If you don't mind, I will wait in the robing room while that is done.

MR. BALLER: We have already marked all of ours.

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THE COURT: But they haven't been officially marked. Isn't that what you have in mind?

MR. BALLER: Yes. I have a bench copy with a list. It does not include the last two exhibits which were just added.

(Plaintiffs' Exhibits 1 through 20 marked for identification.)

(Plaintiffs' Exhibits 21 through 33 marked for identification.)

(Recess.)

MR. BALLER: Your Honor, the exhibits all have been marked. At this time I would like to offer a number of them into evidence.

First we move the introduction of Plaintiffs' Exhibits 1 through 10 and Plaintiffs' Exhibit 12.

I might say that those consist of plaintiffs' interrogatories, defendants' responses to interrogatories and a number of documents which were attached to those responses as exhibits. It is all, except for the plaintiffs' interrogatories, material from the defendants. We move their introduction.

MRS. GORDON: May I just check that for a moment against my list?

THE COURT: Are you going to be using these through

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witnesses this morning?

MR. BALLER: We will be using some of them.

THE COURT: The reason I ask is unless you are --

MR. BALLER: Maybe not this morning but certainly this afternoon.

THE COURT: Make your offer now and let Mrs. Gordon reply by this afternoon.

MR. BALLER: Fine. Let me just continue.

We offer the documents marked Plaintiffs' Exhibits 13 through 20, which are all documents produced by the defendants in response to plaintiffs' requests for production of documents.

We offer Plaintiffs' Exhibit 11, which is a report founded on partially incorrect data, as the discovery process has shown. We offer that with the precaution that the defendants -- we recognize it is founded on partially incorrect data and the defendants should have the opportunity to explain what the incorrectness in the background of that exhibit is.

MRS. GORDON: Your Honor, at this point I would just like to comment.

As I said at the outset, I had suggested offering all the documents in evidence with counsel for both sides highlighting those aspects of the documents they considered

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important and certainly with the opportunity to the other side to say this is incompetent or -- pardon me -- to direct the court's attention to any errors in it.

The court has said, when Mr. Baller objected to my position on that question, that we would take it at the time it arose. We are taking a strict view here.

I except to the offer of that document in evidence.

THE COURT: Then it will be offered in the normal way when somebody is in a position to testify as to it.

MR. BALLER: We further offer Plaintiffs' Exhibits 29 through 35 with this comment: those are statistical tables prepared by us and our assistants. They are based exclusively on statistical information found in the answers to interrogatories and documents produced by defendants. It doesn't come from any other source.

THE COURT: The list I have of your documents which you furnished me with only goes through 33.

MR. BALLER: That is correct. There are two more in your bench copy that have been marked for identification. All of those charts, I think, self explanatory, with the reservation that of course we wish defendants would check to verify the accuracy of those statistics and we are happy to amend them if their original answers or our transcription of the answers are wrong. We offer those.

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MRS. GORDON: We had discussed this previously with counsel with the exception of the last two charts, I believe, which counsel just handed me, and we have had them check and we have had some corrections made I think with the understanding with counsel we would stipulate to the corrections. I have the corrected copies.

THE COURT: When the time comes, if you want to bring them to my attention we will correct them at that time.

MR. BALLER: Finally, Plaintiffs' Exhibit 28, which is statistical evidence relating to the 1970 correction sergeant examination, we offer at this time.

The other exhibits marked for identification we are not offering at this time and will offer in connection with witness testimony during the trial.

MRS. GORDON: I just want to comment on 28. I have no objection to the offer of 28 in order for the court to obtain some context of the process in which we are operating. I object and reserve all rights with respect to any inferences drawn with respect to the 1970 examination as a result of that diagram.

THE COURT: O.K. Can we finally call a witness?

MR. BALLER: We can call a witness. I believe we are going to ask that the defendants' witnesses be sequestered.

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THE COURT: Is that necessary in a case of this kind?

MRS. GORDON: I except to that, your Honor.

THE COURT What is your concern?

MR. BALLER: Our feeling with regard to their witnesses is a large number of their witnesses will be testifying regarding procedures that they jointly undertook. We are worried --

THE COURT: They jointly undertook, meaning the defendants' witnesses?

MR. BALLER: The defense witnesses working through the Civil Service procedures in producing an examination. We think it would be more fair if they didn't have the benefit of listening to each other's testimony before they went on the stand to explain the joint endeavors.

THE COURT: You are talking about listening to the defendants' witnesses?

MR. BALLER: That is correct.

THE COURT: That I may allow.

MRS. GORDON: I don't think I would have any objection to that, your Honor.

MR. BALLER: We call Al Young.

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A L B E R T Y O U N G, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BALLER:

Q Please state your address, Mr. Young.

A Route 216, Stormville, New York.

Q What is your age?

A Forty-two.

Q Are you married?

A Yes, I am.

Q And do you have a family?

A Yes.

Q Could you please summarize your educational background?

A I have a high school education and college -- two years college.

Q When and where did you finish high school?

A I finished Middleton Senior High School, Tampa, Florida.

Q When and where did you do your two years of college?

A At Duchess Community College in Duchess County, Poughkeepsie, New York.

Q When did you do those two years?

A I have been going to evening courses for the past

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four or five years.

Q What subjects have you taken at Duchess Community?

A I have taken many correctional courses geared toward correctional administration. The major academic courses are English, mathematics, correctional administration, juvenile delinquency, correction law.

Q By whom are you employed, Mr. Young?

A State of New York, Department of Correctional Services.

Q Where do you work?

A Greenhaven Correctional Facility.

Q How long have you worked for the Correctional Services Department?

A For the past thirteen years.

Q What is your present job?

A My present job is sergeant in charge of in-service training.

Q Is that a provisional or permanent appointment?

A That is a provisional appointment.

Q Could you briefly summarize the jobs you held before coming to work for the Correctional Services Department?

A Before coming into the Department of Correctional Services, I was a laboratory technician in the Department of

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Medicine in Downstate Medical Center, Brooklyn, New York.

THE COURT: You were a lab technician?

THE WITNESS: Laboratory technician, yes.

Q Did you hold other jobs prior to that?

A Prior to that I was a salesman in the men's department at Bloomingstein's Department Store.

Q Do you recall the date when you went to work for the Department of Correctional Services?

A I recall the date. It was May 11, 1961.

Q What was your first job with the department?

A I was a correction officer assigned to doing various jobs, working first running companies.

Q Was that assignment also at the Greenhaven facility?

A The Greenhaven facility.

Q Have you been at Greenhaven ever since?

A Ever since.

Q I would like you briefly, please, to describe some of your various duties and assignments as a correction officer at Greenhaven.

A It was varied. It is also part of counseling as a correction officer, working with Reality House group. This is an outside group geared toward rehabilitation of inmates. I worked in the laundry. I was the laundry officer for a great number of years. I worked in the auditorium

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where I was the auditorium officer in charge of inmates training in music.

I had various other jobs, relief jobs, in the tower.

Q Is that guard tower?

A Guard tower. Those are relief jobs. And I had other jobs working as a block officer.

Q Would that be the housing?

A The housing for inmates, officer in charge of the housing unit, and relief jobs.

Q Have you worked in any of the shops?

A The shop area I mentioned was the laundry. I did work in the shop there, and I relieved in some of the other shops in the area.

Q Have you worked in the mess hall?

A Yes, I have worked in the mess hall.

Q What were your basic duties as a correction officer in these places, just very briefly?

A Supervision of inmates in the performance of their duties, their assigned tasks.

Q How long did you remain a correction officer?

A For twelve years.

Q During this time, were you given ratings on your job performance?

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A Yes, I was.

Q What was the rating system?

A The rating system when it first started out I think you had good, superior and excellent. At that time I got superior ratings.

Later they changed I think to fair, satisfactory and unsatisfactory, and I always had a satisfactory rating.

Q Do you know when the changeover to satisfactory-unsatisfactory occurred?

A I can't recall the exact date but it was a few years ago there. I just can't remember the exact date on that change.

THE COURT: You said the first was good, superior and what?

THE WITNESS: Excellent.

THE COURT: And the present one is just satisfactory or unsatisfactory?

THE WITNESS: Satisfactory and unsatisfactory.

Q Have you ever had any trouble, criticism, in terms of performance of your job as a correction officer?

A None that I know of.

Q While at Greenhaven, did you ever receive any special commendations for the work you did?

A One -- perhaps two I can recall of. It was an

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incident took place last September at Greenhaven where there were two factions involved in an altercation. I was instrumental in getting that altercation quelled and I received a commendation.

THE COURT: From whom?

THE WITNESS: From Mr. Paul Metz.

THE COURT: Who is he?

THE WITNESS: He works out of the Commissioner's office. I think he is in charge of special services under Commissioner Quick.

Q When did this occur?

A This probably occurred on the day of the incident in September, but I didn't know about it until December of that year.

THE COURT: In what form did he communicate his commendation?

THE WITNESS: For an outstanding performance in the time of crisis. It's written. It's in my central file. There was a verbal commendation from Mr. David Eno, in charge of public relations for the Correctional Service.

THE COURT: What did that have to do with?

THE WITNESS: Commending me verbally for the same incident.

Q Could you explain briefly what happened at the

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altercation and what you did?

A There was a power struggle and a misunderstanding going on between the People's Party and the Muslim group of the facility who came to a clash during the power struggle.

At this time I -- after they had a physical altercation in the yard where, if action hadn't been taken, immediate action, it probably would have been a very serious thing, and it seemed to be an act of God nobody was killed in the incident. As it was, I went into the yard to talk to the one group, the Muslim group, who was in the yard, and I talked to the People's Party, who was in the corridor at the time trying to get to each other. The only thing preventing it was a volley of tear gas fired. This held them temporarily.

I immediately started negotiating with them, trying to bring calmness to them, going around and getting one side locked in and talking to the other to get that side locked in.

At the time we had a limited number of employees, especially experienced onces. So I had to take the immediate step to go into the yard and start negotiating calmness in the institution.

I continued to negotiate with them until 3:00 A.M.

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in the morning.

THE COURT: Was this alone?

THE WITNESS: Later there were others that came in to help me. I was put in charge of it at that time by Captain Zilenski and later by Superintendent Vincent.

Q Mr. Young, do you recognize this letter which has not been marked for identification? It is dated April 18, 1973, and addressed to you.

A Yes, I do.

Q Who is that from?

A A letter from Superintendent Vincent.

Q What is it about?

MRS. GORDON: Objection, your Honor.

THE COURT: Is it the commendation?

MR. BALLER: If you have no objection to putting it in, I will do it that way.

MRS. GORDON: This is the point I mentioned before. I am perfectly willing to allow plaintiff to offer the document in evidence without further foundation and without elaborate detail. I am also willing to have him ask questions about it to the witness although it is already in evidence.

Now, that was the procedure I had anticipated following here, but from counsel's opening remarks I assume

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I am not going to have the same -- or he would contest my doing the same kind of thing. I am willing to proceed.

THE COURT: Without speeches let's proceed in the normal fashion.

MR. BALLER: May we produce this in evidence?

MRS. GORDON: Yes, you may. I have no objection.

MR. BALLER: Number 36.

xxx (Plaintiffs' Exhibit 36 was received in evidence.)

Q You did receive this letter?

A Yes, I did.

MR. BALLER: I would like the record to reflect specifically the second paragraph of this letter reads:

"I would like to commend you on the conscientiousness and diligence with which you have discharged your duties in this capacity."

And the context will reflect the capacity is that of correction sergeant on a provisional basis.

THE COURT: This is a letter from whom?

THE WITNESS: Superintendent Vincent of the Greenhaven Correctional Facility.

THE COURT: Thank you.

Q Mr. Young, how did you come to be a provisional sergeant?

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A I was selected by Superintendent Vincent. I happened to be in Plattsburgh at the time at the drug seminar when I received a phone call that I had been selected as provisional sergeant. I accepted the position.

Q Did you know at the time how you were chosen to be a correction sergeant on a provisional basis?

A At that time I didn't know but later I did find out.

Q Will you tell me what you found out later?

THE COURT: It seems to me we should have the witness who made that decision rather than report what he was told, if it's important.

MRS. GORDON: Your Honor, this is the type of thing I mentioned. I have no exception to this type of testimony. I assume anybody who wanted to present the matters in this case in the time period allowed would have to have a certain amount of hearsay. I certainly will not object to it, subject to cross examination, if the same applies to me, your Honor.

THE COURT: All right. I don't want to degrade the quality of the record here substantially, but if both sides are satisfied that the kind of hearsay that may be brought to my attention is pretty dependable, I am ready to go ahead.

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MRS. CORDON: Subject to cross examination.

BY MR. BALLER:

Q Mr. Young, can you tell us what you subsequently learned about how you were chosen?

A I subsequently learned that Deputy Superintendent Henry Sawner was selecting officers who he felt were qualified to serve in the capacity of provisional sergeant due to educational achievement. He placed a great deal of emphasis --

THE COURT: Where did you get this information, Officer?

THE WITNESS: From Superintendent Sawner.

Q Could you tell us specifically what he told you?

MRS. GORDON: I would like to put an objection on the record to that particular aspect of the case, that particular hearsay, in terms of educational -- I withdraw it. I am sorry, your Honor.

THE COURT: Proceed.

Q What did Mr. Sawner indicate to you?

A He felt men should be given a chance to work as supervisor and be elevated in a position to help themselves.

Q Did he tell you that?

A Yes.

Q When?

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A He told me that one evening after the sergeant exam came out, how the men were selected as provisional sergeant. He was interested in knowing how many men he had selected for that position would have passed the sergeant exam. We discussed that.

Q Would you please briefly describe what your duties and assignments have been as a provisional sergeant at Greenhaven?

A As a provisional sergeant at Greenhaven, there have been many. I have been liaison committee between the -- that is, a member -- administration and the inmate population. I have been an instructor for the Training Academy of New York State --

THE COURT: I am sorry. I didn't hear that.

A The Training Academy. We had a Training Academy there at the New York State Police Academy in Albany. I was an instructor there.

THE COURT: Is that where you do your instruction, at Albany?

THE WITNESS: Albany and now at the facility. I am in charge now of the in-service training due to the absence of the training lieutenant at Greenhaven.

Q How long were you at Greenhaven and how long were you in Albany during this period?

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A I was in Albany for seven months. I was in Greenhaven from the appointment date, which was July 20, 1972, until December 7, 1972.

THE COURT: Where do you work out of at the present time?

THE WITNESS: Greenhaven Correctional Facility.

THE COURT: You went back there?

THE WITNESS: Yes, I am back there.

Q In terms of your working as a laiason with the inmate groups and the administration, what do you do in that function? Is that at Greenhaven rather than Albany?

A Yes, at Greenhaven.

Q What do you do?

THE COURT: Before you answer, did you say you were a member of a committee?

THE WITNESS: I was the laiason -- a member.

THE COURT: A member?

THE WITNESS: Between the inmates and the administration.

THE COURT: I still want to know what you do, but you are a member of a laiason committee?

THE WITNESS: There is a laiason inmate committee, but I am the laiason member between the administration and the inmate population.

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THE COURT: Would you now tell me what you do in that capacity?

THE WITNESS: In that capacity I am meeting with the various and many inmate groups, hearing many of their grievances and taking them to the administration.

THE COURT: You meet with them alone?

THE WITNESS: At that time I was meeting with them alone, yes.

THE COURT: And then who do you report to?

THE WITNESS: I was reporting to the deputy superintendent and, if necessary, the superintendent.

Q Were there any other correction sergeants on that committee?

A There was one sergeant who assisted me, Sergeant Holman.

Q Was one of you in charge?

A I was in charge.

Q Have you had charge over any areas in the prison as a provisional sergeant?

A Yes, I was in charge of the industrial area at the time. I was also in charge once of the maintenance area.

Q At the training academy in Albany, have you instructed in particular subjects?

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A Yes, I have.

Q Which ones?

A Group counseling, role identification, drug identification.

Q And who were your students, if I may use that word, in those classes?

A Correctional officer trainees.

Q Who appointed you to your post at the training academy?

A I was brought in by the then captain, Bellenair, of the training academy.

Q During your years at Greenhaven, have you become involved in any special activities or programs outside your regular duties as an officer and as a sergeant?

A Outside of Greenhaven?

Q Yes.

A And in the community? Yes, I am still actively involved in counseling with drug groups. I am still actively involved with Reality House. They have a street program for drugs.

THE COURT: What community is this?

THE WITNESS: Your Honor, that could cover from New York City, where the main office for the Reality House group is, up to the Duchess County area in Beacon, Fishkill,

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Poughkeepsie area.

Q I don't want to cut you off, but before you go on could you explain what you do in terms of the Beacon area?

A I counsel with those in need of counseling due to the use of drugs in an attempt to bring about rehabilitation or motivate change.

Q Are you doing this now?

A Yes.

Q When did you begin?

A I began about eight years ago.

Q Are you working as a volunteer?

A As a volunteer.

Q What is Reality House?

A Reality House is a drug-oriented program geared toward rehabilitation of those in use of drugs or anyone with problems.

Q Where is it located?

A The main office is now located at 125th Street in New York City.

THE COURT: Do they have some kind of residential place up in your area, Duchess County?

THE WITNESS: Not in my area. They do have -- they were recently given a $22 million grant and they have a chapter inside the facility.

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THE COURT: At which facility?

THE WITNESS: Greenhaven Correctional Facility, and I understood they expanded to three others.

THE COURT: I understood you were dealing with people other than prisoners.

THE WITNESS: That's right.

THE COURT: When you meet with them, where do you meet? What connection has Reality House got with your area? Has it got a facility of some kind?

THE WITNESS: Your Honor, they have a staff on the outside. When I work with them, this is primarily in New York City. When I work in Duchess County it is through the neighborhood service organization when I work with this group. They have an office up there in Beacon.

THE COURT: That is the local Duchess County organization?

THE WITNESS: Yes. There is also the OEO chapter there, Office of Economic Opportunity.

Q Do you work with convicts or ex-convicts in connection with Reality House?

A Yes.

Q How is your work there related to convicts or ex-convicts?

A Those who have shown promise [illegible]s rehabilitation,

we work together as co-therapists in a therapy group.

THE COURT: Where do you work on that?

THE WITNESS: Inside the facility at Greenhaven and outside.

THE COURT: Where then, generally speaking, on the inside?

THE WITNESS: On the inside, yes.

Q Have you worked with any other organizations in the Duchess County area?

A The school group. I get referrals from school teachers in the Duchess County area. I work with the churches and I have worked with the Duchess Reform Church there, who had a federal grand and a summer program geared toward rehabilitation and having calm summers.

There again, teen agers, who have drug problems, and I have been a counsellor with that program.

Q Have you done any work at Greenhaven with the Narcotics Addiction Control Commission?

A Yes. I worked with the Narcotics Addiction Control Commission as officer-counsellor from its beginning until its closing at Greenhaven Correctional Facility.

Q Was that inside the facility?

A That was inside the facility, yes.

Q What period was that?

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A That was done in the period of 1968 to 1971.

Q Did you have any role in setting up that program?

A Yes, I did.

Q What was it?

A Setting up the training for the correctional officers counseling, assisting in some of these programs, training in the J Block. At that time it was known as J Block. Especially the training program for officers.

Q You mentioned earlier that in Greenhaven since you returned from Albany you are doing some training of correction officers, is that correct?

A Right.

Q What do you train them in?

A We train them in our phase -- I was sergeant in charge of all the counsellors involved with training, and we were training in techniques and dynamics of training evaluations of all the trainees and all the related subjects to the Department of Correctional Services training.

Q During your thirteen years at Greenhaven, have you been working with sergeants?

A Yes, I have.

Q Do you know what sergeants do?

A Yes, I have knowledge of what sergeants do.

Q Has the work that you have been doing as a

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provisional sergeant for the past year been any different from the work that permanent sergeants have been doing?

A No.

Q Have you taken the examination for a sergeant's job?

A Yes, I have.

Q How many times?

A I have taken it four times.

Q Could you give us the dates as close as you can remember them?

A As close as I can remember, the first exam was taken in 1964 and I failed that. And then in 1967 I took it and I failed that one. In 1970, and the last one '72.

Q Did you pass or fail in 1970?

A I failed.

Q Did you pass or fail in 1972?

A I passed.

Q Was that examination 34944?

A Yes.

Q Do you know where you rank on the eligible list from that examination?

A Yes.

Q What number?

A 265.

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Q Do you know whether you rank high enough to be appointed from that list?

MRS. GORDON: Objection.

THE COURT: Overruled. He is being asked if he knows.

Do you know?

THE WITNESS: I do know it is number 265.

THE COURT: Do you know is that high enough to be appointed?

THE WITNESS: No, I don't really know, your Honor, but I doubt it that I would be reached at that number.

THE COURT: You haven't been appointed?

THE WITNESS: I haven't been appointed.

Q You did not receive a notification in early April or in late March that you were to be appointed, did you?

A No.

MR. BALLER: Your Honor, I would also direct the court's attention to the answers to interrogatories, number 40, in which defendants state the number -- number 39 and 40, in which defendants state the number of persons who are expected to be appointed off the eligible list. 87 have so far been considered, I believe. They expect 10 to 15 in the next six months, 20 to 30 in the next 12 months, 40 to 60 in the next 18 months. That would bring

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us up to about 150, according to defendants' estimate.

THE COURT: 150 --

MR. BALLER: That would be 18 months from the date of the eligible list. It is admittedly an estimate by the defendants.

MRS. GORDON: That assumes that the situation works in terms of the first 150 on the list. In other words, tht it goes 1 through 150. In fact, by virtue of the operation, it does not go that way and now they are up to, I believe, 105 or 110. This is only April.

THE COURT: The defendants will be allowed to either cross examine or put in testimony.

BY MR. BALLER:

Q At the time you took that examination, you had already been working for a number of months as a provisional sergeant, had you not?

A Right.

Q Did you feel that that examination was related to the skills and abilities that you were using on that job?

A I can't recall all the questions of the exam at this time. I will say if there was any part unrelated, it was the comprehensive part of the exam.

Q What is the comprehensive part?

A The reading comprehensive part of the exam.

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Q Would you state that that was unrelated?

A I would state that that was unrelated.

Q When you first came to Greenhaven, I believe it was in 1961, did you say?

A 1961.

Q How many black correction officers were there?

A ARound five or six.

Q And how many white correction officers were there?

A I would say around 250.

Q How many black correction officers are there at Greenhaven now?

A There are 73 black correction officers.

Q And about how many white correction officers?

A I would say just about 390.

Q Has there ever been a Hispanic correction officer at Greenhaven?

A Yes, there is now.

Q How many are there now?

A At the present time we have approximately, I would say, 50.

THE COURT: Fifty?

THE WITNESS: Fifty.

Q When did you first have a Hispanic correction officer at Greenhaven?

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A About two years ago or a year ago.

Q In your years at Greenhaven, has there ever been a black or Hispanic supervisory level officer?

A A black or Hispanic supervisory officer, yes, there was one black supervisor.

Q Who was that?

A Lieutenant Clayton Hill. He is a lieutenant now. At the time he was a sergeant.

Q Do you recall when he became a sergeant?

A He became a sergeant around 1968, I believe.

Q Aside from Lieutenant Hill, have there been any other black or Hispanic supervisors at Greenhaven?

A None.

Q When did you first learn about this lawsuit?

A At the time it was brought about through one of the plaintiffs.

Q And which one was that?

A Mr. Nathaniel Hayes.

Q Do you favor this lawsuit?

A Yes, I do.

MR. BALLER: No further questions.

CROSS EXAMINATION

BY MRS. GORDON:

Q Sergeant Young, you say you passed examination

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34944 and you are 264 on the list, is that correct?

A 265.

Q Do you know when the list will expire for examination 34944?

A No, I don't.

THE COURT: What does that mean, the list expire?

MRS. GORDON: A list expires, your Honor, by operation of law after a certain period of time.

THE COURT: You mean that anybody on it has to requalify?

MRS. GORDON: That is correct, your Honor.

Q Do you know when that date would be that 34944 list would expire?

A No.

Q Do you know what I mean by "expire"?

A When it is exhausted, I believe. Do I take it you mean when the list is exhausted?

Q When it would be exhausted.

A Right.

Q Do you know what number on the list they are down to now, Sergeant Young?

THE COURT: Do you, Mr. Young?

A No. I heard you say they are probably at 110. I don't know the number, but hearing you mention it a few

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minutes ago, they are up to 110.

Q Assuming they were at 110, do you believe there would be an opportunity for you to get appointed during the course of the life of the list?

A I don't really know. I would like to believe that, but at the rate they are going now, I don't know.

Q Do you know how long the 1970 list was in existence for sergeant?

A No. I believe it was exhausted, but the exact length of time I don't know.

Q Would you tell us what you mean by "exhausted"?

A That the list for 1970 was completed.

THE COURT: I think what you both mean is you ran out of names on that list before the period of expiration occurred.

MRS. GORDON: That's correct, your Honor.

THE COURT: I learn quickly.

MRS. GORDON: In a highly technical field, your Honor.

Q You mentioned your participation in certain drug programs. I recall Reality House and Exodus House. Were those two programs operating through the institution, in other words, through or at Greenhaven, or were these both programs you did outside of your work at Greenhaven?

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A Well, to answer your question, inside and outside, but the beginning was through the facility. They operate in the institution.

Q Were these programs created under the auspices of the superintendent of the facility or the Department of Correction?

A They are voluntary groups that were given the O.K. by the superintended to come in and conduct a program. They are now state funded programs for the institution.

Q With the exception of your services at the training academy at Albany while you were a provisional sergeant, I recall you noted you had certain specific responsibilities at Greenhaven, is that correct?

A Right.

Q One was in the training area, is that correct?

A Yes.

Q And one was in supervising maintenance and group conseling, is that correct? What specific areas at Greenhaven have you covered as a sergeant?

A As a sergeant I have covered the area -- first we started out I was the laiason member between the inmates and the administration, that is, at that time hearing many grievances of the different groups there and discussing it with the administration and going back and discussing it

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with the inmates.

Q That was as a sergeant?

A As a sergeant, yes. In fact, we now have a man in the position in the voluntary services under the deputy superintendent in charge of programs.

The other, I also was in charge of certain assigned areas in the maintenance or in the industrial area.

Q I would just like to show you at this Defendants' Exhibit T --

MRS. GORDON: It can be marked for identification, your Honor, if you wish.

Q I would like you to take a look a. this chart, which purports to be a chart of areas at Greenhaven.

THE COURT: What is the exhibit number?

MRS. GORDON: Defendants' Exhibit T. Can we have that deemed marked for identification?

THE COURT: All right.

(Defendants' Exhibit T marked for identification.)

Q Page 1 purports to be a schematic of Greenhaven Correctional Facility. The next page I believe is the duty roster for the weeks July 15 through 28 and then an assignment sheet.

Would you just look at that and tell me,if you can, from the diagram where you worked at Greenhaven in the

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maintenance and in the industrial area. I would like to know on the diagrams where those are located.

THE COURT: Why don't we do this in a proper fashion. I take it nobody will object to having this exhibit in evidence.

MR. BALLER: None at all.

THE COURT: It will be admitted in evidence.

xxx (Defendants' Exhibit T was received in evidence.)

A Number 11.

Q You worked at number 11?

A Number 11 I worked.

Q And where else did you work?

A I have worked at number 3. They are numbered and then they give the areas in which they are numbered. For example, number 11 would cover the laundry and the bathhouse, number 3 the kitchen east-west, the bakery and the storehouse. That is number 3.

I worked at number 8, where I was in charge of covering C and D Blocks. I had that assignment as a sergeant.

I have worked number 12. Number 12, first floor, covers commissary, electrical shop, vocational schools.

THE COURT: Are you talking about as sergeant?

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THE WITNESS: As sergeant, yes.

THE COURT: What is that last one?

THE WITNESS: That is number 12. It was covering commissary, plumbing and electrical shop, vocational schools. On the second floor they had the South 40 program and the mosque of the followers of Elijah Muhammad.

THE COURT: What is the South 40 program?

THE WITNESS: That is a federally funded program, educational program, in the institution. It assists inmates toward rehabilitation with emphasis on education.

THE COURT: Have we done enough traveling?

THE WITNESS: I could go on.

As a sergeant, I would say I handled various problems on here. Specifically I could go through it.

Q I just noted on page 3 of this exhibit, which is an assignment sheet or roster for July 15 --

MRS. GORDON: It says 74. I think that is wrong.

Q -- July 15, 1973, through July 28, 1973, that your name is at the bottom and it indicates training, which is training in the area you had in the narcotics program or is this something separate?

A The training I had in the narcotics, but this is separate. This is training, in-service training, for all correctional employees.

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Q Did you conduct the course?

A At times, yes. I write the lesson plans for them and I supervise it.

Q Do you work with a training lieutenant?

A Yes, I am working with Lieutenant Kolor, who is the training lieutenant at Greenhaven Correctional Facility.

Q You mentioned that the portion of the examination 34944 that you found unrelated was the reading -- was the comprehension part, is that correct?

A That's correct.

MRS. GORDON: Mr. Baller, do you have the exhibit number for the test?

MR. BALLER: Yes; 18 and 19. They are two separate documents.

Q In that statement, sir, were you referring to the following portion of the exam: questions 46 through 60 of booklet 485-E, Plaintiffs' Exhibit 18 for identification? Just take a quick look.

A I would have to look through it.

THE COURT: Are you asking him if that is what he was talking about?

MRS. GORDON: If that was the section of the examination he was talking about when he was talking about the reading comprehension, or the comprehension.

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THE WITNESS: I would say this is the section, and I will be more specific in saying around --

Q I can't understand you.

A I would say 5-G. Yes, I would say this is the section.

Q Is this the section you are referring to?

A Yes.

THE COURT: Starting with question 46 and going through where -- to the end?

MRS. GORDON: The end of the first booklet, which is question 60.

THE COURT: Mrs. Gordon has been asking you what you found to be unrelated.

THE WITNESS: That is what I am saying. When she said starting from the beginning going into the area --

THE COURT: She wants to know what you were talking about. That is question 46. So if you could tell us from 46 -- whether questions 46 through 60 was the part you had in mind or if there was a different part, certainly tell us.

THE WITNESS: 46 through 60.

MR. BALLER: He has already testified to that a couple of times.

THE COURT: I don't know what this 5-G is.

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THE WITNESS: I saw it in the back.

Where was I? That's 56. It looked like 5G.

THE COURT: 46 through 60 of Exhibit 18.

Q In the course of your duties at Greenhaven as a provisional sergeant, have you had occasion to prepare written material for your supervisor?

A Yes.

Q Do you do that frequently?

A Frequently.

Q Could you give us an estimate? Is it daily, twice a week?

A There are times it's daily, there are times it's twice a week, or more. It all depends on the material and what I have to prepare it for. On an average it's nothing less than two or three times a week.

Q Are these materials that you prepare called reports at the institution?

A Some of them are considered reports at the institution.

Q What other types of written material do you prepare other than reports?

A Lesson plans that I make up isn't considered a report.

MRS. GORDON: I have no more questions, your

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Honor.

MR. BALLER: I have one question.

REDIRECT EXAMINATION

BY MR. BALLER:

Q Mr. Young, Mrs. Gordon asked you about these voluntary groups coming into the institution, I believe. Did you have any part in bringing them in?

A Not in the Reality House. This was there when I came in. I think they had Reality House or it came in shortly after. I have had some say in some of the other programs coming in prior to the man who was in charge of voluntary services of the program.

MR. BALLER: I have nothing further of this witness.

(Witness excused.)

THE COURT: We will take a ten minute recess. Be back promptly.

(Recess.)

MR. BALLER: Plaintiffs call Gerard Ryder for cross examination.

THE COURT: I don't know what you mean for cross examination.

MR. BALLER: He is anofficer of the defendants, of the Correctional Services Department.

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THE COURT: That doesn't automatically make him a hostile witness, if that is what you had in mind. If he turns out to be hostile, I will rule on the question.

Mr. Ryder, please come up.

G E R A R D R Y D E R, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

MR. BALLER: I would like the record to reflect the previous witness, Mr. Al Young, is black. I forgot to ask the question.

THE COURT: I will take judicial notice of it.

MR. BALLER: Your Honor, you might not believe it, but many courts we have been in are unwilling to hazard a guess.

DIRECT EXAMINATION

BY MR. BALLER:

Q Mr. Ryder, please state your address.

A 318 Spring Street, Ossining, New York.

Q What is your race?

A Caucasian.

THE COURT: Right. Much obliged.

Q Please summarize your educational background.

A I was graduated from grammar school in 1925.

THE COURT: Did you go to school in Ossining, by

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any chance?

THE WITNESS: No.

THE COURT: I live right near Ossining.

Q Did you attend high school?

A No, sir.

Q Have you taken any further courses of an educational nature since then?

A No, sir.

Q By whom are you employed?

A State of New YorkDepartment of Correctional Services as the Ossining Correctional Facility.

Q What is your position?

A Assistant deputy superintendent.

Q How long have you been in the Correctional Services Department?

A Almost 32 years.

Q That would be since about 1941?

A September 8, 1941.

Q Between the time you left school in 1925 and the time you went to the department in '41, did you have any jobs that were related to law enforcement or corrections?

A No, sir.

Q Now, since 1941, could you very briefly summarize the different jobs you have held for the department and the

locations where you have worked?

A I started in Clinton Prison and I worked in what is now known as the special housing unit.

THE COURT: Is that at Clinton or where, the special housing unit?

THE WITNESS: Yes, it's called the special housing unit today.

THE COURT: But you are talking about something that is at Clinton?

THE WITNESS: Yes.

THE COURT: What is that -- solitary?

THE WITNESS: Solitary, right.

THE COURT: They always think of the best names for it, don't they?

THE WITNESS: They sure do.

A (Continued) Did you want it all?

Q Unless you wish to tell the court, I won't require you to state exactly which jobs you have held within the prisons, just which prisons and what periods and what jobs, like officer, sergeant.

A Officer.

Q How long were you there?

A About 20 months.

THE COURT: That was right at the beginning, is

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that right?

THE WITNESS: Yes, sir.

Q What was your next job or location?

A Wallkill Prison.

Q Were you also a correction officer there?

A Yes, sir.

Q For how long?

A Oh, approximately ten years.

Q What was your next job after that?

A You don't want any rundown on my jobs within the facility?

THE COURT: I would like to know a little about it.

MRS. GORDON: Could the witness speak a little bit louder?

THE COURT: Could you speak so Mrs. Gordon can hear what you are saying?

THE WITNESS: I sure will. I thought I was speaking quite loud.

THE COURT: Tell us a little about what you did at Wallkill.

THE WITNESS: At Wallkill I held various -- ran various shops, the laundry, parttime the messhall, some of the industrial shops and for a number of years I ran the cannery.

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THE COURT: What did you can -- fruit?

THE WITNESS: Canned everything conceivable: fruit, vegetables, with the exception of meats, in number 10 cans.

THE COURT: What size is that?

THE WITNESS: Just under a quart; 13 cups.

THE COURT: All right. Let's go on from Wallkill, then.

THE WITNESS: From Wallkill I transferred to the Ossining Correctional Facility as an officer.

THE COURT: That was about what -- 20 years ago?

THE WITNESS: No -- yes, right, about 20 years.

BY MR. BALLER:

Q And how long were you at Ossining as an officer?

A There again, ten years, approximately.

Q What did you do at Ossining?

A I worked the wall positions, I took gangs out in the field of painting and decorating, I ran the maintenance shop for a brief period of time, I worked nights in all the housing blocks. Then I worked in the special housing unit for about eight years.

Q After that, I guess that brings us up to about 1960, '62.

A '62.

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Q Where have you been since then?

A They I made correction sergeant on a temporary basis at Coxsackie Correctional Facility from the then existing sergeant's list.

Q How long were you at Coxsackie?

A Five, six months.

Q Where did you go after that?

A Then I went back to Sing Sing as an officer.

THE COURT: You mean as a correctional officer, not as a sergeant?

THE WITNESS: Not as a sergeant at that particular time.

Q How long did that continue?

A Six to eight weeks.

Q What came next?

A Then I was made permanent sergeant in Greenhaven Correctional Facility.

Q And how long were you there?

A I was there again, give or take, twenty months.

Q Did you have a particular assignment during that time?

A Yes, I did.

Q What was that?

A I worked the late shift and assisted -- I was in

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the area the -- the industrial area where they made sheeting, material for clothing, etc.

Q Where did you go after this twenty months at Greenhaven?

A I transferred to the Ossining Correctional Facility as a sergeant.

Q And how long did you stay there?

A As a sergeant?

Q Yes.

A Fourteen months.

Q And did you have a special assignment?

A Well, the assignments varied due to the geographical layout. You are assigned to one particular area, then you may be assigned to run the movies, and at that particular time everyone was expected to be in the messhall and you were directed to be where, say, the majority of the population was at any particular given time.

Q Did you make another rank after that?

A Yes, sir.

Q What was that?

A I made lieutenant.

Q Was that also at Ossining?

A Yes, sir.

Q When was that?

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A '65, '66.

Q Have you been at Ossining since then?

A Yes, sir.

Q And have you made other ranks since then?

A I made assistant deputy superintendent there.

Q When?

A Four years ago.

THE COURT: That is your present job?

THE WITNESS: Yes, sir.

Q Could you briefly describe what your duties are as assistant deputy superintendent at Ossining?

A I assist the deputy superintendent, take his place when he isn't there, and I would say at various times I have handled personnel in dealings with inmates, various groups of inmates.

Q Is it part of your job to deal with the officers and sergeants in the institution?

A Yes, sir.

Q Do you know most of them?

A I would say yes.

THE COURT: How many do you have there? How many officers, approximately?

THE WITNESS: 360. Naturally, the ones that came later I am not too familiar with them.

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THE COURT: About how many sergeants?

THE WITNESS: Right now, 23. Normal complement is 17.

THE COURT: How many inmates do you have?

THE WITNESS: A thousand. I mean this is an approximation. It fluctuates.

THE COURT: Surely. It changes every day, I suppose.

THE WITNESS: Yes.

Q Have you ever been acting superintendent?

A Yes, sir.

Q How frequently have you held that job?

A Five or six times.

Q Would it be fair to say that you are basically familiar with all of the jobs at the prison?

A Yes, sir, with the exception of the superintendent. I am just there filling in for the day or two days.

Q Are you familiar with the jobs of correction officer and correction sergeant at other institutions as well as at Sing Sing?

A Well, when I was at Greenhaven I was familiar with various assignments, which are vague now, and when I was in Wallkill Prison there were only four sergeants, and when I was in Clinton there possibly were seven or eight.

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The inmate population was over two thousand.

Q Have you worked with sergeants and officers at a number of these institutions over the years?

A Yes, sir.

Q Are you also familiar with the various job duties and assignments of officers and sergeants at Ossining at the present time? Are you familiar with the duties and assignments of officers and sergeants at Ossining?

A Yes, sir.

Q Could you briefly tell us what are the most common job assignments for correction officers at Ossining?

A Well, the most common is custody and security. I can say if you want to move into specific areas, in the blocks, in the laundry, in your state shop complex, chapel complex, messhall areas, which is all one, and the rec areas, meaning recreation areas, and then we have the induction center and then many officers are involved in picking up men for drafts that we necessarily have to send to other institutions.

Usually a sergeant is in charge of that one overall detail during the day.

Q I am asking you about correction officers. Have your comments been directed to officers?

A My mistake.

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Q You did answer with respect to officers?

A Oh, yes. The only thing -- O.K.

THE COURT: I gather most correction officers worked in custody and security, and I guess that would be in the cell blocks.

THE WITNESS: Anything which concerned -- when I use that term, anything is custody and security whether they are working in a shop, whether they are working on the wall.

THE COURT: All right. Then if everything is custody and security, would I be correct in assuming that most of the men are stationed in or near the cells but that a lot of them also work in these other areas you are talking about?

THE WITNESS: Areas.

Q What are the most common job assignments for correction sergeants at Ossining?

A We have the sergeant in charge of the complex that houses the laundry, the state shop, the bathhouse, the barber shop; then we have the housing blocks, we have a sergeant in charge of one section -- one part of the housing blocks, a sergeant in charge of the -- excuse me -- another area of housing blocks plus the chapel, which houses the commissary and the two churches.

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Q Is this basically a geographical matter? Does a correction sergeant have supervision over a certain area?

A Well, yes. However, it is a geographical area to the point where it isn't 20 square feet or a square mile. It is a geographical area.

THE COURT: It is a geographical area described by a particular function, is that it?

THE WITNESS: There would be more activity in one geographical area than the other.

THE COURT: The geographical area depends on what is being done there, is that right?

THE WITNESS: Right.

Q You said the basic job of a correction officer is custody and control, is that right?

A Yes.

Q What is the basic job of a sergeant?

A The basic job of anyone in the correctional -- in a facility is custody and control. We may address ourselves to whatever category you ask me. We are all concerned with custody.

Q What does a sergeant do that makes his job different than a correction officer's job?

A He supervises the correction officers and sees to it that the various activities in his particular area

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run smoothly, that the inmates -- that the officers are seeing that the inmates are conducting themselves properly and doing their work.

Q Does he deal frequently with correction officers as part of his job?

A Yes.

Q Does he also deal with inmates directly as part of his job?

A Yes.

Q Based on your knowledge of the officer and sergeant jobs at various institutions, would you say there is much difference between being a correction officer at Ossining and being a correction officer at other institutions?

A Institutions vary but it all is mainly custody and security.

Q How about being a sergeant at Ossining as opposed to being a sergeant at one of the other places?

A A sergeant at Ossining probably has more varied duties and he gets around more and the inmates have more opportunity to approach a sergeant. I am taking this from my experience when I worked there at the time I worked there.

Q It is basically a similar job, though?

A Basically, yes.

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Q What, in your judgment, are the most important things that a man needs to be a good correction officer?

A Common sense.

Q Would you say it's important to have an ability to get along with inmates as a correction officer?

A Yes.

Q Is it important to have the ability --

THE COURT: Are we talking about correction officer or sergeant?

MR. BALLER: Correction officer.

Q Is it important to get along with other correction officers as well?

A Yes, sir.

Q In your experience, is a man who makes a good correction officer generally likely to make a good correction sergeant?

A I can't respond to that just right off.

Q Is it that you don't know or you would like some time to think?

A Give me some time to think.

Q O.K.

A Well, let me say on the whole, yes.

Q Perhaps I can put it this way. Are there things you need in addition to what you need to be a good correction

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officer that would make a man into a good correction sergeant? Are there any additional qualities?

A A stronger quality of leadership.

Q Exactly what do you mean by a quality of leadership?

A Being able to relate to correction officers properly and show them -- tell them how to do their job. In other words, a correction sergeant should have developed more knowledge of the various areas of a correction institution as opposed to one that probably sat on the wall for four or five years and doesn't have any knowledge of the internal workings of the institution.

Q How do you measure a man's capacity for leadership, which you have said is important? I say how would you measure specifically a correction officer's capacity for leadership?

THE COURT: Do you wet your finger and stick it up in the air?

THE WITNESS: Well, like the old-time pilots, probably, by the seat of my pants.

Q If a man was working for you, would you take a look at the way he does certain parts of his job?

A Certainly.

Q What part of the job are you mostly concerned with

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when you are trying to measure a man's leadership?

A Would you give me that again, please?

Q Yes. What parts of a man's job, if he was working for you, would you be particularly concerned with if you were trying to measure his leadership ability?

A If he was getting along with his officers, if he was relating, reporting, oral or in writing, properly, and if I gave him a particular job to do and he did it and he didn't take overly long.

Q Would you judge him by watching how he performed the job assignments you gave him?

A Oh, yes.

Q Do you find experience as a correction officer is necessary or helpful to a man's becoming a good correction sergeant?

A Yes, sir.

Q How much experience do you think is necessary as to time?

A My own opinion is about five years. And I might say that probably the records will show not many have made it under five years.

Q Has the job of correction officer changed very much over the years that you have been in the department?

A Yes, sir.

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Q In what ways?

A Well, I was merely a prison guard when I came to work and you were not supposed to relate to the inmates at all about anything other than what went on in the prison, the time of the day, the sun is shining, the nature of that.

Q What is the difference in the present job?

A The present job, you are supposed to -- he is busy.

Q I am sorry. I am listening to you, Mr. Ryder. I am just writing something.

A Now I forgot where I was.

THE COURT: The question is what is the difference now. You were saying in the past you only related about unimportant things like the time of day.

THE WITNESS: Right. Now you relate to the inmate. You listen to his problems and you try to assist him, say not yourself with the public but bring it to the various areas we have, such as the service unit, who has the man's complete record and can evaluate any information that you may gather from having contact with the inmate.

Q How about the job of correction sergeant; has that changed over the years?

A In relation to the correction officer, yes.

Q In what specific ways has it changed?

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A In the same way. He relates to the inmates and he relates better to the officers rather than a cut and dried military "you do this, period," and walk away from him.

Q Are correction officers rated on their performance?

A Yes, sir.

Q How about correction sergeants?

A Yes, sir.

Q Who rates them?

A Individually or collectively?

Q Collectively. Say correction officers, who rates them?

A They are rated by the supervisors that come in contact in their area and then its subject to review by the deputy superintendent.

Q Would the supervisor be only sergeants or higher level supervisors?

A Mostly it would be -- no, I have got to qualify that. On the afternoon shifts when there were no sergeants, the lieutenant would rate his correction officers, likewise on the midnight shift, and collectively they would rate the other shifts, I would say. A large amount of the work would be done by the sergeants, evaluating.

Q Who evaluates the sergeants?

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A Lieutenants, captain.

Q What ratings are used at the present time?

A Satisfactory and unsatisfactory.

Q Has there been a different system of rating in the past?

A Oh, yes.

Q When was that?

A Well, I would say in the early sixties it changed over.

Q What was the old rating system?

A If I may refer, outstanding, superior, good, fair and poor. Prior to that they had a point system.

Q So you have been moving in the area of simplicity?

A Right.

Q How frequent are unsatisfactory ratings at the present time?

A In the past year I believe we gave seven or eight. When I say "we," I am talking administratively. The superintendent, really.

Q Are special commendations given to officers and sergeants very often?

A Not very often.

Q Are they rare?

A I would say so.

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Q Why aren't they given more frequently?

A Well, for one thing, lack of time; the other thing, because in most areas you would say the man, it's his job. That's what he is getting paid for.

THE COURT: A commendation is kept for something unusual?

THE WITNESS: Right.

Q You have a number of provisional sergeants at Ossining at this time, don't you?

A Yes, sir.

Q You have had them for most of the year?

A I believe it's a year.

Q Do you recall when they were appointed?

A August, I believe, '72.

Q Do you know what they do?

A The same as a permanent sergeant.

Q Are you familiar with their work?

A I am familiar with their work, yes.

Q Do you know how --

A With exceptions.

Q How many provisional sergeants do you have at the present time?

A Six, seven.

MRS. GORDON: Excuse me, your Honor. Could we

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have a clarification? Does he mean provisional sergeants by virtue of that August appointment or sergeants who would be permanent but for the court's temporary restraining order?

THE COURT: The six or seven, were they all appointed last August?

THE WITNESS: Yes, sir.

Q Are they all black?

A At the present time?

Q Yes.

A Yes.

Q Were there other provisional sergeants appointed last August who are no longer provisionals?

A Yes.

Q They lost their provisional appointments in about April of this year?

A Prior -- no -- April, I would say April. Maybe it was late March, early April.

Q I want to refer some questions to the whole group, in other words, the provisionals you have now and the others you had from last August up until this spring.

Do you know how those provisional sergeants came to be appointed?

A Why, yes.

Q Did you participate?

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A Yes.

Q Could you tell us how it was done?

A The superintendent sent around a directive --

THE COURT: The superintendent at Ossining?

THE WITNESS: At Ossining Correctional Facility.

A -- requesting all supervisors then to submit to him ten names for his evaluation in order to pick out the ten that he would finally, or whatever, be appointed, what he would finally appoint.

Q Did the supervisors make recommendations?

A All, to the best of my knowledge. I know I did.

Q And you personally made some recommendations as well?

A The ten names. I submitted the ten names along with everybody else.

Q Did you work with the superintendent in setting up this method of selecting people?

A No, sir.

Q Were you satisfied that the people you recommended would be competent correction sergeants?

A That's why I submitted them, yes, sir.

Q Did the superintendent appoint the people that you recommended?

A I would say two or three; four, possibly. I know

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one that was appointed. He turned it right down in two weeks and reverted to a correction officer. He felt that he would rather make it through the proper procedures.

Q Were all the superintendent's appoin ments based on recommendations by you and other supervisors?

A I have no knowledge of that because I didn't know what the other supervisors had submitted to the superintendent when the list came out. The superintendent has all that information.

Q Did you recommend Edward Kirkland for appointment?

A No, sir.

Q Did you recommend Nathaniel Hayes?

A No, sir.

THE COURT: They were appointed, though, right?

THE WITNESS: Oh, yes.

Q Did you recommend Arthur Suggs?

A I believe I did.

Q And James Holman?

A I believe I did.

Q Has the supervisor force, the sergeants, been functioning smoothly at Ossining since last August?

A Yes, I would say smoothly. I have seenit run better, I have seen it run worse.

Q On the whole, has the provisional sergeants' work

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been satisfactory?

A Yes. They have been very diligent.

Q Are you familiar with the work of Edward Kirkland as a provisional sergeant?

A Yes, sir.

Q Has that been satisfactory?

A Yes. A deviation here and there.

Q But it is your testimony it has been satisfactory?

A Yes.

Q How about Nathaniel Hayes, are you familiar with his work as a provisional sergeant?

A No, I am not, not up until the time I made my deposition.

THE COURT: Have you learned of the quality of his work since you made your deposition?

THE WITNESS: Two or three weeks, four weeks, not enough time, and I have been ill myself and I don't get around the institution to that extent.

Q Do you consider Edward Kirkland qualified to be a correction sergeant?

A Yes, if he passed the test.

Q You say yes, if he passed the test?

A Yes.

Q Do you know of any reason other than his not

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passing the test he would not be qualified?

A No, I wouldn't say so.

Q Were you familiar with the work of Nathaniel Hayes before he became a provisional sergeant?

A As an officer?

Q Yes.

A Yes.

Q Do you consider him qualified to be a correction sergeant?

A Yes.

MR. BALLER: No further questions.

THE COURT: Mrs. Gordon.

CROSS EXAMINATION BY

MRS. GORDON:

Q Mr. Ryder, you mentioned that you were familiar with all the jobs at least at Ossining, is that correct?

A Yes, Ma'am.

Q I would like to show you Defendants' Exhibit U now identified and ask you whether or not that is a typical assignment sheet for sergeants and lieutenants as those positions exist at Ossining?

A Yes, Ma'am.

THE COURT: Are you putting it in evidence?

MRS. GORDON: Yes, I would like to put it in

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evidence as Exhibit U.

(Defendants' Exhibit U was received in evidence.)

MRS. GORDON: Properly, your Honor, I think I should offer it in evidence just as to the sergeants' assignments. Lieutenants' assignments appear there. It's part of the context. Obviously I have no objection to --

THE COURT: Let's put the whole thing in. Otherwise it is confusing.

I take it there is no objection.

MR. BALLER: That's correct.

BY MRS. GORDON:

Q I call your attention to the righthand column describing -- well, what does that righthand column describe? Would you just tell the court? Is that the geographic areas you were talking about?

A The geographic areas, yes, Ma'am.

Q Where it says garage, for example, item 7, Sergeant Scott, reading across, it says: Garage, yards and grounds, outside and inside, superintendent, deputy superintendent, etc.

Those activities or those facilities, are they within a given geographic area at Ossining?

A That is the entire geographic area of Ossining

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Correctional Facility. Let me [illegible] that way.

THE COURT: He is in charge -- what he has to do is everywhere?

THE WITNESS: Everywhere. The garage would be his base of operation.

Q Does this Sergeant Scott here at item 7 have supervisory responsibility for the designated areas in the righthand column on the 7:00 to 3:00 shift?

A Yes, Ma'am, inasmuch as -- well, he has varied details there because I see he has wall posts, emergency squads,and the others are simply maintenance of the grounds. The wall post is supervision of the wall officers and emergency squads in case we come in -- have an emergency we have a certain amount of officers that are trained and he directs them.

THE COURT: On this exhibit, do you still have it in front of you?

THE WITNESS: Yes, sir.

THE COURT: At the bottom, Sergeant Kirkland, number 5, his first assignment was HBB.

THE WITNESS: That is the housing block area that at present is not occupied, but the reason that is on this, evidently he has to see that it's kept in good condition, on occasion see that an officer takes a squad

in there and cleans it out and dusts the furniture.

Q Just to make it clear, was the housing block closed down recently at Ossining?

A Closed down twice.

Q Is it open now for inmates?

A No, it is not. I would say it is closed down for about a year, possibly, eight montns.

Q You mentioned, in response to counsel's questions, about ratings that there were satisfactory and unsatisfactory ratings for both officers and sergeants at the present time.

A Yes, sir.

Q Do you know approximately how many unsatisfactory ratings were given let's say last year?

THE COURT: At Ossining?

MRS. GORDON: At Ossining, yes.

THE COURT: And for what category?

MRS. GORDON: For officers.

A Sevenor eight.

Q How about for sergeants, do you have any idea?

A We don't have any. To my recollection, we did not give any sergeants an unsatisfactory rating.

Q Is seven unsatisfactory ratings how it runs with respect to officers in any given year?

A I would say last year it was higher than it had

been in previous years.

Q And there were approximately 360 officers last year?

A Fluctuating, actually. As our facility expanded and decreased, we went to 349.

THE COURT: Is it fair to say normally about 350?

THE WITNESS: Right.

THE COURT: It's a very small number that get unsatisfactory ratings, is that right?

THE WITNESS: Yes.

Q That's exactly what I was going to ask you next, Mr. Ryder.

During the course of your deposition didn't you testify to the effect that somebody had to be pretty unfit to get an unsatisfactory performance rating?

A I did, yes.

Q Is that your opinion here today?

A Yes, it is.

Q On direct examination, counsel inquired of you as to how the provisional appointments for sergeant in the summer of 1972 were made. At this time I would like to show you Defendants' Exhibit L for identification.

MRS. GORDON: We previously provided a copy to Mr. Baller of an exhibit to be marked as Defendants' Exhibit

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L. That letter is dated July 9, 1973, and is a response from Superintendent Schubin to a member of the Department of Correctional Services setting forth his memorandum of August 23 on the provisional situation and with some other comments. I would like to offer that letter. However, if counsel objects, I have a copy of the August 23rd letter separately.

MR. BALLER: We object to Exhibit L, which appears to be not a regular business record but a trial preparation document dated July 9 of this year. We have no objection to the August 23rd letter.

THE COURT: So we will mark the August 23rd letter, as it has just been called, as Exhibit L.

(Defendants' Exhibit L was marked for identification.)

Q I show you Defendants' Exhibit L for identification and ask you if that is a copy of the memorandum you received from Superintendent Schubin referable to recommendations for provisional appointment?

A This is it.

MRS. GORDON: At this time I move that that document be marked in evidence as Defendants' Exhibit L.

MR. BALLER: No objection to that.

THE COURT: Received in evidence.

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(Defendants' Exhibit L was received in evidence.)

MRS. GORDON: Is the court keeping a set of the exhibits as marked?

THE COURT: You keep them. At the end of the hearing, everybody give me the exhibits at one time.

Do you want me to look at that?

MRS. GORDON: Yes, I would like you to. There are certain aspects of these documents, obviously, that we want to call the court's attention to and we will do that in our post-trial memorandum. I don't want to take the time now to go through all the documents piece by piece.

BY MRS. GORDON:

Q At this time I show you a set of documents marked Defendants' Exhibit M for identification and ask you to look through this set of documents and see if you find a copy of the recommendations you made to Superintendent Schubin.

A Here is mine. I have it here. It is dated August 27.

MRS. GORDON: At this time I move that this set of documents be marked in evidence as Defendants' Exhibit M. The set includes the recommendations of Mr. Ryder and the

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ten other -- was it ten, Mr. Ryder? -- ten other supervisors -- the other supervisors who also made recommendations.

MR. BALLER: We have no objection to their introduction in evidence. To the extent that they are meant to prove anything other than these are the ten people that were nominated by however many supervisors there were, we would like the right to examine the witness on what else might be implied by these documents, but for that purpose we have no objection.

THE COURT: You can always do that.

(Defendants' Exhibit M was received in evidence.)

Q By the way, looking at that document, do you recall who it is you recommended for provisional appointment at that time? Does that help you refresh your recollection?

A Yes, it does, greatly. I couldn't find my copy.

Q I don't think we need go through the whole list. Do you find that you recommended either of the plaintiffs, Kirland or Hayes?

A No, I do not find that I did.

Q You mentioned in response to counsel's questions here today that you considered plaintiff Kirkland at least to be a competent sergeant at this time.

A Yes, right.

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Q I think you mentioned further in response to the court that you hadn't observed plaintiff Hayes sufficiently in the sergeant title.

A Right.

Q I recall at your deposition, Mr. Ryder, you gave some indication of dissatisfaction, if I may call it that for a moment, with either or both of the plaintiffs.

Could you please tell the court whether you have had any reason to find these men -- whether you have had any reason to find these men's performance of their duties either as correction officers or sergeants to be inappropriate?

A Well, as I did say in my deposition, Mr. Kirkland, when he was a sergeant, on an occasion I looked for him in an area he was supposed to be in and I could not locate him there, and we had a discussion about it and after that incident, why, I never had occasion to find him out of order.

Q How about plaintiff Hayes?

A Only as a sergeant. I would say we should go back. It has to be almost ten years. As a sergeant in what we call the commando shift, I had given him instructions to go to Housing Block B, which was open at the time, and counting lock in the area. Now, that is effected by

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you go to the correction officer in charge of the block and he portions out, you go to this area, you go to this area and you go to this area. Due to this mix-up, the area he gave Officer Hayes was covered by another officer and then Mr. Hayes did not take any part in counting or locking the block that night.

Q This was while Mr. Hayes was a correction officer?

A Oh, yes.

Q I recall also during your deposition with reference to the recommendations for provisional appointments you testified to the effect that it was difficult to get names to recommend to the superintendent.

A Yes.

Q Would you tell us what you meant by that?

A It was difficult because many men had outside interests and did not want to relate to the time change it would necessitate because their outside interests were fixed.

THE COURT: What time change do you mean? If he were a sergeant it would take more time or it would be a different time?

THE WITNESS: A change of hours. If a man worked 8:00 to 4:00, conversely, if he worked 4:00 to 12:00 he didn't want --

THE COURT: Don't the correction officers rotate their hours? Do you always work the same shift?

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THE WITNESS: We always work the same shift now. We used to rotate our hours.

THE COURT: Now you don't?

THE WITNESS: No.

Q A correction officer doesn't necessarily work the same shift from the beginning of his career to the end?

A No, he moves up and down.

Q Were there correction officers at Ossining at the time you sought to give the superintendent your recommendations whom you thought would make good provisional sergeants but yet refused the job?

A Yes. Well, refused -- asked me not to put their names in for recommendation.

Q Did you do your best to try to give the superintendent your best judgment in this as to the candidates to be named in the context you were operating, namely, that there were people who didn't want the job?

A I tried.

Q During your deposition you stated that some of the sergeants' -- that sergeants' duties in general would require a man to meet people, communicate properly; you also mentioned common sense in the aspect of correction officers; knowledge of the laws, rules and regulations I believe you also mentioned.

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Assuming that an examination, that is, a competitive examination, had areas on it that went to laws, rules and regulations of the department, went to supervision, went to judgment, went to report preparation, are those areas consistent with what you mean by leadership, common sense, judgment? Is an examination in those areas consistent with what you believe to be some of the significant aspects of a sergeant's duty?

MR. BALLER: I would like to object. That is a rather elaborate leading of a witness who obviously is Mrs. Gordon's own witness.

THE COURT: It seems to me the important thing to find out is what he thinks is important in the job and then we later get into the question of whether the test covers those areas or doesn't.

MRS. GORDON: All right, your Honor.

THE COURT: If someone thinks judgment and common sense is important for a job, a test which covers that is important.

MRS. GORDON: My point is the test has its own language of how it describes itself. Equally, people in operations have their own language. I just wanted to avoid an inference that these people, the people in operations and potentially the test makers, were speaking of two

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different things.

THE COURT: You can show him the test and ask him whether it covers the areas he had in mind and which part covers which subject.

MRS. GORDON: I think I can do that --

THE COURT: We are not talking about a hypothetical area, we are talking about an actual area.

MRS. GORDON: That is true, but in the interest of time rather than giving the witness the whole test to go through --

THE COURT: I would like to save time any way I conscientiously can, but if you ask a witness about a test it will have to be about the test we are talking about.

MRS. GORDON: O.K. I think in the interest of expedition I will withdraw the question at this phase.

THE WITNESS: Thank you. I don't remember it.

Q Do you have any opinion on whether or not the competitive examination system or the provisional appointment system is better suited to getting qualified sergeants, for example?

A Well, the provisional appointment method is in its infancy. I have only known of one instance, and this is the one in which I am involved.

THE COURT: Are you saying that there is not

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enough experience to tell yet?

THE WITNESS: No, I wouldn't say that either, Judge. I would say that the other way is better.

THE COURT: I suppose that would force me to ask how can you tell us it is better if the provisional system has been in for such a short time.

THE WITNESS: In my personal opinion.

Q What is the basis for your personal opinion?

A Well --

Q Let me put the question another way. Does the provisional appointment system have any defects that you have observed from its operation? And I believe you were an acting sergeant at one point yourself, is that correct?

A I was a temporary sergeant appointed off a Civil Service list in which I held rank 12A.

Q Let me return to my original question. Are there any defects, in your opinion, in the provisional appointment process?

A Well, I would say yes. I mean it isn't involved enough, and I certainly don't know enough about the proper methods of selecting people and I only have 360 to pick from where the test is statewide, there is 4,000, and I believe they have much more sophisticated methods of finding out if a man can do these things than I personally have or anyone in

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a small group such as a small group of supervisors. We may have diverse opinions. We just don't have time to address ourselves to this type of selection.

MRS. GORDON: Thank you very much, Mr. Ryder. That's all I have.

THE COURT: Do you have any further questions?

MR. BALLER: Several questions. I will try to be brief.

REDIRECT EXAMINATION

BY MR. BALLER:

Q Mr. Ryder, with regard to this memorandum to Theodore Schubin that you wrote recommending a number of people, Defendants' Exhibit M, one of the pages, you wrote the memorandum, didn't you?

A Yes.

Q It says at the top: "In reply to your memo of August 23, 1972, I believe the following correction officers would make excellent sergeants."

And then you list them?

A Yes.

Q Now, Mr. James Holman, do you know whether he passed or failed the examination?

A I believe he failed it.

Q Is it still your opinion he would make an excellent

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sergeant?

A Yes.

Q How about Mr. Arthur Suggs, did he pass or fail?

A I believe he failed.

Q Is it still your opinion that he would make an excellent sergeant?

A Yes.

Q Are there other men on that list who failed the examination?

A May I have it a little closer?

Q You certainly may.

A Yes.

Q Are there any men on there who passed the examination?

A I believe one.

Q So one out of the ten men you chose based on your judgment actually passed?

A Yes. I might note that -- if I may -- prior I had said five years, and I see that I have one here less than five.

Q Who is that?

A James Holman.

Q Do you think he developed particularly quickly as a correction officer?

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A Yes, I think so, that he is probably one of the few I might have thought so.

Q Now, in regard to your comments about Mr. Kirland's job performance, you stated that at one point you had had some problem with that.

A As a --

Q A correction officer?

A I don't believe --

THE COURT: He said he was looking for him where he should have been and he didn't find him.

THE WITNESS: That was as a correction sergeant. He is going into a whole series of things whereby I didn't say I had the problem. I would say Mr. Kirkland had the problem.

Q Nevertheless --

A And I was giving you a general picture developing Mr. Kirkland into what I thought was a competent correction officer.

Q I am sorry. I am a little confused. Are you talking about him as a correction officer or sergeant?

A I had asked you. There are two areas in that deposition.

Q Was this problem that you had with Mr. Kirkland when he was an officer or sergeant?

A You keep mentioning a problem.

THE COURT: Wait a minute.

Q Do you prefer I call it an incident?

A Yes.

THE COURT: May I try to clarify what I believe to be the record? I understood Mr. Ryder to have said something negative about Mr. Kirkland in one respect, and that is during the period he was a sergeant you once had to look for him in an area where he should have been, you didn't find him and you talked it over with him and it has been all right since.

THE WITNESS: Yes.

THE COURT: I also understand you to have said he was a competent correction officer.

THE WITNESS: Yes, but then he is looking for a place where we went into detail for ten years.

THE COURT: I didn't hear that. I mean I didn't hear that testimony in the deposition, of course, and I wonder why the plaintiffs want to go into that at the present time.

MR. BALLER: We are trying to discover, especially since Mr. Ryder did not mention it in his deposition, when it was he looked for Sergeant Kirkland and was unable to find him.

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THE WITNESS: I believe if you look --

MRS. GORDON: I except to counsel's remarks and I would like counsel to cite the portion of his deposition he is referring to.

THE COURT: I think I misunderstand. Counsel was just saying that all he wants is an explanation from Mr. Ryder as to the date of the incident he is referring to.

Would you please be seated, Mrs. Gordon.

THE WITNESS: I do believe I mentioned that in the deposition.

THE COURT: Never mind what happened before. When did it happen?

THE WITNESS: About four months prior to the time the man asked me.

Q Where was he supposed to be?

A He was supposed to be in the movies. We had a movie going on at the time.

Q With regard to Mr. Hayes, you said something negative regarding his work on one occasion.

A As a correction officer.

Q How long ago was that?

A Roughly ten years, nine years.

Q And you have had no other occasions to doubt his work since then?

A No, sir. I believe in the deposition you had asked me and this came to mind and I gave it to you.

Q Is it correct that you had about 14 provisionally appointed sergeants out of your staff of 23 at the end of last year and the beginning of this year?

A Yes -- no. Correction. We had 14 out of 17. We haven't had the 23 sergeants since the beginning of this court action.

Q So the majority of your staff was provisionally appointed in terms of correction sergeants?

A Yes. May I also state that some of our correction sergeants were appointed temporary lieutenants. However, they were still our sergeants.

Q But the ones who were working as sergeants were 14 out of 17 provisional?

A I would say so.

Q You also testified when I questioned you that your sergeants staff had been functioning about as well as usual, a little better than at some times, a little worse than other times.

A Give and take.

Q What is the basis for your opinion that the provisional appointment system is not as good as the examination system, then?

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A I pointed out previously that because I don't think I myself am as well qualified to evaluate people for picking them for sergeant.

I also believe in my deposition that you questioned me about higher ranking officers, and I responded in the same vein.

MR. BALLER: I have no further questions.

THE COURT: Anything else, Mrs. Gordon?

MRS. GORDON: No, your Honor.

THE COURT: Thank you very much, Mr. Ryder.

THE WITNESS: You are quite welcome.

(Witness excused.)

THE COURT: Ladies and gentlemen, we will adjourn for lunch and resume at 2:00 o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 P. M.

MR. BALLER: Before we start with testimony, I think we have resolved the plaintiffs' exhibits in question.

THE COURT: Nothing like leaving the plaintiff and defendant alone in a locked room.

MR. BALLER: I think Mrs. Gordon will agree with me that we have decided that Plaintiffs' Exhibits 1 through 10 and 12, Plaintiffs' Exhibits 13 through 20 are admissible without objection.

THE COURT: If that is agreed now I will mark my own copy of the documents. 1 through 10, 12 through 20.

MR. BALLER: Let me state with reference to Plaintiffs' Exhibit 12 that subsequent to the compilation of that exhibit by defendants a small error was noted in that one person who is in reality black was listed in that statistical exhibit as white.

THE COURT: Why don't you just correct it jointly.

MR. BALLER: We will do that at the next break, with your Honor's permission.

MRS. GORDON: We corrected our copies but not the court's because Mr. Baller didn't feel it was appropriate.

MR. BALLER: In addition, we have agreed that Exhibits 29 through 33 are admissible without objection. There are a few, again, minor statistical corrections

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that will have to be made on them and they can be made at the break. As corrected, they can come in. That comment --

MRS. GORDON: That is substantially correct, your Honor. It is just on Exhibit 30 I would like to call the court's attention to the fact that there appear on that exhibit certain facilities, namely, 16, all camps, and 12, medical center, Beacon -- I am stating this for the record, your Honor -- that do not have the title correctional sergeant in their facility structure.

THE COURT: You mean that is the way it appears on there or does not appear on the exhibit but it should?

MRS. GORDON: It appears on 29 with a note, note 2. It says: "Include supervising officer, chart officer, senior officer."

What I am trying to point out is those are different titles than the title structure we find at the other correctional facilities, and they do not include the title of sergeant.

THE COURT: All right.

MRS. GORDON: Youth camps again have a different title.

MR. BALLER: They are not strictly relevant to this case but they were included in the answer to the interrogatory on which the charts are based.

In addition, Exhibit 34, which is again a statistical chart, there is a minor correction to be made and we will make that and, as corrected, we agree it is admissible.

Exhibit 35 we have possibly one minor correction. Mrs. Gordon would like to note an objection in reference to that chart, which refers to scoring on the 1970 examination.

MRS. GORDON: Yes. The chart is drawn from a statistical analysis of the 1970 examination. As I stated previously, we have no objection to the court looking to the statistics thereon for the context of this case. We have an objection to any inferences drawn therefrom as to the job relatedness of the 1970 examination and should the court, after hearing the evidence here, decide it wishes to hear evidence of job relatedness on that examination, then with appropriate procedures we will come forward with that evidence.

THE COURT: All right.

MR. BALLER: In addition, we are moving admission at this time of Exhibit 28, statistical evidence regarding the scoring of white and black and Hispanic officers on the 1970 sergeant examination, and I believe Mrs. Gordon has the same objection or statement with respect to that exhibit, the 1970 scatter diagram.

MRS. GORDON: Plaintiffs' charts which they have

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made up are drawn from the scatter diagrams that we have previously provided, and obviously the same objection goes to the chart as well as to the diagram itself.

THE COURT: I don't understand you truly to be making an objection but rather to be stating that you agree that they are admissible for a limited purpose.

MRS. GORDON: That is correct, and reserving our rights on the job relatedness aspect.

MR. BALLER: We also are offering at this time Plaintiffs' Exhibit 11, the report I mentioned earlier based on some statistics which were infirm and Mrs. Gordon has a comment on that.

MRS. GORDON: Your Honor, as we pointed out during discovery, this particular report was done for in-house use at a time when full data was not available and is concededly inaccurate. Therefore, we think that it is inappropriate to put that document in evidence.

THE COURT: Mr. Baller, what is your position on that? Even if it was made up, if it is incorrect it might be misleading.

MR. BALLER: The document contains some summaries of statistical evidence. It also contains some qualitative statements regarding the cost of certain scoring patterns on the examination.

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The deposition I believe of Mr. Taylor -- correct me if I am wrong -- indicated there were some statistical errors in the background information. They were on the level of -- I don't know -- ten or twenty items out of a sample of something over one hundred.

In any event, they do affect the accuracy of the statistical background but did not seem to totally change the statistical import.

In any event, we are not submitting it for the statistics. We have later statistics which correct these, but there are comments within the report which effect an evaluation of that kind of statistical pattern.

THE COURT: I prefer to rule on Exhibit 11 when we come to it in context and when either side can read me from the deposition of the identifying witness or he is on the stand, whatever the case may be, so I get a full picture of the situation.

MR. BALLER: We may do that.

THE COURT: Let me state for the record that Plaintiffs' Exhibits 1 through 10, 12 through 20, 28 subject to the reservation made in regard to it, 29 through 33, 34 and 35 subject to any reservations expressed and in all cases subject to the corrections which counsel have indicated will be made, are admitted in evidence.

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(Plaintiffs' Exhibits 1 through 10, 12 through 20, 26, 29 through 33, 34 and 35 were received in evidence.)

THE COURT: Just so we don't get confused here, I think it would be a good idea if you actually hand those exhibits to the clerk and let her mark them.

MR. BALLER: The clerk has them all.

THE COURT: Are they in the folder?

MR. BALLER: Yes, they are in the folder.

THE COURT: Generally, do you want this back again, Mrs. Gordon?

MR. BALLER: Do you prefer to hold these?

THE COURT: No, I prefer not to hold them.

MR. BALLER: Let me also state in response to your Honor's question as to which exhibits we particularly want to draw your attention to, just briefly for the statistical information on the racial composition of various jobs at various facilities we would direct your Honor's attention to Plaintiffs' Exhibits 29 and 30.

THE COURT: Don't go too fast for me, please. 29 and 30.

MR. BALLER: This shows how many correction officers, sergeants and so on, and black, white and Hispanic at each institution. And Plaintiff's Exhibit 31, which is a departmental total.

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THE COURT: That is also the same subject matter?

MR. BALLER: Right. These are in turn based on and summarize Plaintiffs' Exhibit 3.

THE COURT: O.K.

MR. BALLER: For the statistical evidence with respect to the impact of the 1972 correction sergeant examination with separate date for whites, blacks and Hispanics, we would direct your attention to Plaintiffs' Exhibit Number 12.

THE COURT: All right.

MR. BALLER: Which is summarized in Plaintiffs' Exhibits 33 and 34.

With regard to the impact of the previous correction sergeant examination in 1970 on the different ethnic groups, we direct your attention to Plaintiffs' Exhibit 28, which is summarized in Plaintiffs' Exhibit 35.

THE COURT: All right.

MR. BALLER: I think you will find that most of the other exhibits marked in evidence relate to the examination itself and its preparation and we will be referring to them during the course of testimony but much of the summary information about how the exam was drawn and validated and so on is contained in those other documents.

THE COURT: Thank you.

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MRS. GORDON: Your Honor, a representative of the Department of Correctional Services has called to my attention on Exhibit 31 it goes A, B, C --

THE COURT: You want me to look at it?

MRS. GORDON: I think you might make a note. I don't know if you have to look at it.

THE COURT: It is easier for me to understand what you are talking about.

I have it in front of me.

MRS. GORDON: A, B, C are total employees of the department, not employees in the security forces, and then as you go on down --

THE COURT: It might include a cook, for example.

MRS. GORDON: Or secretaries or what have you. As you go down to D, total employees each rank, then you return to the security forces.

THE COURT: All right.

MR. BALLER: If your Honor please, we will be happy to mark your bench copy of these exhibits with the minor statistical changes as well as the court copy.

THE COURT: Thank you. Are we ready to proceed with testimony?

MRS. GREENBERG: Yes. Plaintiffs call Arthur Suggs.

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GW

ARTHUR E. SUGGS, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. GREENBERG:

Q Mr. Suggs, will you state your address?

A 2175 Lacombe Avenue in the Bronx, New York.

Q Would you please state your race?

A Black.

Q What is your age, Mr. Suggs?

A Thirty-six.

Q By whom are you presently employed?

A By the New York State Department of Correctional Services.

Q In what position?

A Provisional correction sergeant.

Q At what facility?

A Ossining Correctional Facility.

Q On what date were you appointed to that position?

A August 30, 1972.

Q Were you a correction officer before that?

A Yes, I was.

Q On what date did you become a correction officer?

A January 26, 1967.

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Q Would you please summarize your educational background?

A High school background.

THE COURT: Where did you go to high school?

THE WITNESS: George Washington High School.

THE COURT: In New York?

THE WITNESS: Yes.

THE COURT: Is that while it was still a good school?

THE WITNESS: Yes.

Q Were you in the military?

A I was in the reserves.

Q For how long?

A Twelve and a half years.

THE COURT: Did you actually serve?

THE WITNESS: No, I didn't.

Q What employment did you have before you became a correction officer?

A I worked for the New York Postal Data Center as a data equipment operator. New York Postal Data Center.

Q Did you have any other jobs before you joined the Department of Correctional Services?

A I worked as a transfer agent at the New York State Department of Social Services.

Q What did you do in that job?

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A I was a transfer agent.

THE COURT: What does that mean?

THE WITNESS: That's transporting inmates.

THE COURT: Are these criminals?

THE WITNESS: Juvenile delinquents, 7 to 14.

Q Would you please describe your work as a correction officer? First tell me what job assignments you held as a correction officer.

A I have held all job assignments in the institution since I have been a correction officer.

Q Could you tell us what some of those job assignments were?

A Well, I started out I was -- I worked in various shops, the shoe shop, brush shop, knit shop, bathhouse, state shop, messhall. I was a housing block officer for two years. The housing block is where they have inmates housed at. I was on various transporting of inmate details, including the Attica hearings. We had the Attica riot hearing right after the Attica riot a year ago.

Q What did you do with the inmates?

A I transported the inmates that were testifying against the state down to Channel 13.

Q Are there any assignments at the institution which you have not had or which you did not have as a correction

officer?

A No.

Q Can you tell me --

THE COURT: By that you mean assignments as a correction officer?

MRS. GREENBERG: Yes.

THE COURT: You have done all that a correction officer does?

THE WITNESS: Yes.

Q Can you tell me what supervisory ratings you received as a correction officer?

A All satisfactory.

Q Have you since you have been with the Department of Correctional Services received any particular training or taken any particular educational courses?

A Yes.

Q Would you describe them, please?

A I went to several in-service training at Beacon, New York, for advance officers and one for senior advanced officers. I just finished the crime control instructor program for instructors at the New York Department of Civil Service.

Q What was the purpose of that program?

A To qualify certain officers to be instructors for

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the department.

Q Did you become so qualified?

A Yes, I did.

THE COURT: Where was that course given?

THEWITNESS: At the Department of Civil Service in Albany, New York.

Q Would you please describe the job assignment that you have held as a correction sergeant?

A My job assignment now, I am a relief sergeant. In other words, I cover about the same thing as I covered as I was an officer. In other words, I cover all the jobs.

Q You do the same things in those areas that you did when you were an officer?

A No, it is not the same thing. My present job right now is I have the superintendent's grounds, the deputy superintendent's residence, all yards and grounds and investigations and emergency squads.

Q What other assignments have you had?

A I was shift commander, which is 4:00 to 12:00. It's a lieutenant's job.

Q You mean by that it is a job that is ordinarily done by a lieutenant?

A Yes. When they say shift commander, that is a lieutenant's job.

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THE COURT: Like being officer of the day?

THE WITNESS: Right.

Q Are there any other assignments that come to mind?

A Various investigative jobs within the institution which involve security, contraband and various other things.

Q As a person on -- I believe you said you were on relief duty.

A Yes.

Q As a sergeant on relief duty, have you had an opportunity to do most of the different kinds of jobs that a sergeant does?

A I have done all the jobs that a sergeant does.

Q Have you received any supervisory evaluations since you have been a provisional sergeant?

A To my knowledge, no, but I have been told orally that I had a satisfactory rating.

THE COURT: Who told you?

THE WITNESS: My superintendent, Superintendent Schubin.

THE COURT: He is the top man in the institution?

THE WITNESS: Yes, sir.

MRS. GREENBERG: Would you please mark this for identification Plaintiffs' Exhibit 37.

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(Plaintiffs' Exhibit 37 was marked for identification.)

Q Have you seen this before?

A Yes, I have.

Q Would you please tell the court what it is?

A It's -- I believe it's a letter involving we had an altercation.

THE COURT: It is a letter from whom to whom?

THE WITNESS: From the superintendent to me.

Q What is the date of the letter?

A August 6, 1973.

MRS. GREENBERG: It is a very brief letter, your Honor, and I would like the witness to read it.

MRS. GORDON: I have no objection to putting it in evidence.

THE COURT: It is received in evidence without objection.

(Plaintiffs' Exhibit 37 was received in evidence.)

THE COURT: Read it.

THE WITNESS: Dated April 6, 1973.

"Dear Sir:

"I wish to express my personal appreciation by commending you for your cooperation, perseverance and

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dedicated performance as a supervisor at the Ossining Correctional Facility when the need for such leadership was critical.

"I also wish to advise you that I will recommend you for permanent appointment at this institution or any institution if the occasion should arise.

"Theodore Schubin, Superintendent."

Q Have you had any teaching assignments either at the institution or at the training academy since you have been a correction sergeant?

A Yes, sir, I have.

Q Would you please describe those?

A I instruct employee rules and regulations at the institution, and I also give classes at the New York State Police Academy to the new correction officers; inmate and employee rules and regulations.

THE COURT: Where is the police academy -- in Albany?

THE WITNESS: Yes, sir.

THE COURT: May I ask a little more about that? How often do you give such classes?

THE WITNESS: It was on a basis up until the first of the year on a once a month basis.

THE COURT: Thank you.

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THE WITNESS: Actually it depends on the cycle of the class. If they had two classes, I had two classes. If there was only one class in, I went once.

Q Is the police academy the place where correction officers are trained?

A Yes, new correction officers.

Q Have you, since you have been employed by the Correctional Services, participated in or helped organize any special programs that were related to your work but not a part of your required duties?

A Well, I am presently involved in Rehabilitation: Halfway House. This is outside my present job.

Q Would you briefly describe that?

A It's a program that is funded by ASA, which is the Addiction Service Agency, and it's now being federally funded. We are involved in inmates coming out of the institution that need a place to stay. We more or less try to get them into the outside activity of being outside the institution.

Q Do you hold a particular title or job with that program?

A Yes, I do.

Q What is that?

A I am on the board of directors. I am secretary

on the board of directors and I also am on the advisory board.

Q Do you receive any compensation for that?

A No.

THE COURT: How much time a week would you say you spend at it, or a month?

THE WITNESS: At least about three, four times a week.

THE COURT: You mean meetings?

THE WITNESS: Meetings and checking.

Q Did you take the 1972 examination for correction sergeant?

A Yes, I did.

THE COURT: The one under attack?

MRS. GREENBERG: Yes.

THE WITNESS: Yes.

THE COURT: 34944.

Q Did you receive a passing score?

A No, I didn't.

Q Have you taken any examination for promotion to correction sergeant before 1972?

A Yes, 1970.

Q Did you receive a passing score?

A No, I didn't.

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Q Were you eligible to take any sergeant examinations before 1970?

A No, I wasn't.

Q Would you describe as best you can remember the 1972 examination?

THE COURT: Do you want to zero in on any particular point. The exam is in evidence, of course.

MRS. GREENBERG: If I may, I would first like to get Mr. Suggs' general impression of the examination.

THE COURT: You are asking for his personal reaction to the examination?

MRS. GREENBERG: Yes.

A Personally, for the type of work that we do, that I have done, it wasn't job related. By "job related," I am saying that none of the questions on the test had anything to do with any type of work that I have done either as an officer or as a sergeant.

THE COURT: I haven't studied it with that in mind but I will; but you mean none of the questions had anything to do with it?

THE WITNESS: I wouldn't say none. Mainly the most part of that, I would say the first 15, they dealt -- it was from the rule book. The rest of the exam, personally I don't feel it was job related.

THE COURT: All right.

Q Do you recall any questions dealing with supervision?

A Yes.

Q Do you feel that those questions asked you about information which you need to know as a correction sergeant?

A No.

Q Can you tell me what you felt was wrong with them?

A Well, on the supervision questions, I think they stated -- they made up the test more or less on working in civilian-type background than working in the type background correction officers in the type of word that we do. In other words, you can't supervise on the same level in an institution as you can on the outside.

THE COURT: It would be very helpful to me if we could take the exam itself and let the officer point out to me one or two questions so I can understand the kind of thing he is talking about.

MRS. GREENBERG: I am going to show the witness Plaintiffs' Exhibits 18 and 19, which comprise the examination.

Q Would you just go quickly through the examination and see if there are particular kinds of questions which

feel are the types you were just talking about.

THE COURT: That is, questions about supervision which you think really refer more to civilian work than to correctional work.

Mrs. Greenberg, if you have some idea of what questions the witness had in mind, I have no objection to your pointing them out to him. I don't think it is a question of leading. I just want to know what he is talking about. It is a question of identification.

Q Did you have in mind when you just testified some of the questions included in test 486-E?

THE COURT: That is Exhibit 19, is it?

MRS. GREENBERG: Exhibit 19.

MRS. GORDON: Excuse me, Mrs. Greenberg. Exhibit 19?

MRS. GREENBERG: Yes.

THE COURT: Exhibit 19, yes, 486-E.

Q If there were other questions that you had in mind, just point them out to the court.

Did you have in mind when you made that statement any particular questions or was your statement made as a result of an overall impression of the examination?

A Can we take question 33?

THE COURT: Yes, On 486-E?

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MRS. GORDON: That is 485-E, Exhibit 18.

THE COURT: O.K., 33. Just a minute until I find it. I am glad I didn't have to take the test.

Yes, I see it.

A To me, in that particular question that's employees. Now, employees, to me I think that in the field that we are in we run a semi-military organization and employees. With this question we wouldn't go into this. This is more or less on a civilian type of thing as far as I'm concerned. In other words, like within an office.

THE COURT: Do you mean by that that you don't use the word "employees" in your profession or do you mean that the kinds of questions that are being asked about there aren't the kinds of things you worry about?

THE WITNESS: Right, in our profession, right.

THE COURT: O.K.

Q Do you want to point out any other particular items to the judge?

A 32. Like I said before, it's a different type of atmosphere when you mention subordinates. I, as a supervisor, as a correction supervisor, have found myself in a different type of position than in question 32.

THE COURT: I think that gives me an idea of what the witness has in mind.

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Q Are there some aspects of the sergeant's job as you have experienced the sergeant's job which were not tested for in the examination?

A Yes.

Q Would you tell me what those aspects are?

A Tensionwise, what are you going to do in a critical situation. Like I said, I was involved in a confrontation in the lower yard, and it required on-the-spot thinking, and after we came out of the lower yard we were sent back -- I personally, myself, and Sergeant Kimble were sent back in the yard by the superintendent. A spark could have touched off another riot.

Q How did you deal with that?

A We met with the -- actually, three factions and we talked it over and we got them calm and they said they wanted to see the superintendent. I was instrumental in bringing each faction up to the superintendent.

Q Are there any other aspects of the sergeant's job which were not covered in the examination?

A Well, institutionwise. Institutions, I am not that well -- I don't have 32 years of correctional work, but the type of work that I do is involved, and several times I had to make on-the-spot decisions. We had men -- I have personally been involved with men hanging up, which

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meant committing suicide; I had several men with their arms cut; and direct supervision or direct on-the-spot training was involved. Somebody could have been hurt or somebody could have been killed.

Q Did examination 34944 not cover --

A It did not cover these particular jobs institution-wise.

Q Would you please describe as well as you can remember it the nature of the 1970 sergeant's examination which you took?

MRS. GORDON: May I interpose an objection to that?

THE COURT: I note the objection, but I will accept the evidence for later determination as to whether it is appropriately received.

MRS. GORDON: Thank you.

THE COURT: And suppose we have a continuing objection so you don't have to rise every time.

Will you answer the question now.

A Except for the reading comprehension on the 1970 exam, I found that the exam was mostly out of the rule books but for the reading comprehension they had no -- it wasn't job related.

Q When did you first hear about this lawsuit?

A Right after the test, which was -- well, not right

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after the test. After the test marks came out.

MRS. GORDON: Your Honor, may I interpose an objection to that? I don't quite understand the relevancy of that question.

THE COURT: I don't either.

MRS. GREENBERG: The defendants have claimed this is not an appropriate class action, and I am trying to establish the interest of the class in the action.

THE COURT: All right.

Q From whom did you hear about this lawsuit?

A From the plaintiffs.

Q Were you in favor of their bringing the lawsuit when you heard about it?

A Yes, I was.

Q Are you still in favor of it?

A I am.

Q Do you know people who in your opinion are good correction sergeants but failed the 1972 examination?

A Yes, I do.

MRS. GORDON: Objection to that, your Honor. I think it is inappropriate to have a correction sergeant comment on the qualifications of a person lateral to him in the title structure.

THE COURT: It may be inappropriate from the point

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of view of morale at the institution but it is perfectly appropriate in this court if I consider the witness to be qualified to render such an opinion, and I do. So I will accept it.

A Yes, I do.

MRS. GREENBERG: Thank you. No further questions.

CROSS EXAMINATION

BY MRS. GORDON:

Q You mentioned in the course of your direct examination that as a correction officer you worked at pretty much every assignment at Ossining, is that correct?

A Yes.

Q Have you ever been at any other facility aside from Ossining?

A No, I haven't. Excuse me. When you say in any institution besides, have I worked in any?

Q Have you worked as a correction officer or sergeant in any other institution?

A No, I haven't worked in any other.

Q Now, I show you Defendants' Exhibit V in evidence and call your attention to the portion which bears your name. It's marked 2, Provisional Sergeant Suggs, 7:00 to 3:00, garage, yards, etc. Please look at that.

I am sorry. It is Defendants' Exhibit U in evidence.

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THE COURT: What are you asking him?

Q You mentioned in the course of your testimony that you covered garage, yards, etc. Is that indication on that duty roster there the definition of that assignment that you were referring to when you talked about supervising the superintendent's grounds, the garage, and so on?

A Yes.

Q And I believe you also mentioned --

THE COURT: Just let me get it.

Is that number 7 there? Is it Scott?

MRS. GORDON: No, Sergeant Suggs.

THE COURT: I know this sergeant's name --

MRS. GORDON: I am asking him about the assignment he was talking to.

Q Down at the bottom of this list where there is again a number 2, it says: Provisional Sergeant Hayes, vacation-PL-sick relief.

I call your attention to that part of the exhibit. Do you see that?

A Yes.

Q You mentioned in your direct testimony that you did relief work. Is that a description of relief work as sergeants do it at Ossining?

A Right.

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Q Will you please tell me what the PL means?

A Well, if a sergeant -- we are talking about sergeants now. Sergeants can take time off, too. In other words, PL means personal leave. If a sergeant on that sheet had personal leave for a particular date, Sergeant Hayes would relieve him, he would be the sick and PL relief sergeant.

Q So when you said you did relief work, you meant that on days when other sergeants were absent from there duties you would go in and fill in for them?

A Yes.

Q And by virtue of your present assignment to garage, yards, etc. and this relief assignment, you have pretty much done almost all the sergeant assignments at the facility, is that correct?

A I have.

Q Since the time you have been a provisional sergeant?

A Yes.

THE COURT: As a matter of curiosity, Sergeant, how often do these assignment lists come in?

THE WITNESS: That particular one -- can I see that? That particular one came out right after the test marks came out.

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Q This one did?

A Yes.

THE COURT: Do they issue these once a month, any particular time or just now and then?

THE WITNESS: Just now and then.

Q The way it works at the institution, Sergeant, between the time one of these sheets comes out and the next time another sheet like it comes out, do the sergeants perform the duties designated on these sheets?

A Right. May I make a statement?

That sheet is not always correct because during the course of one day there is not that many sergeants there. In other words, you will find that the messhall sergeant might not be in and that moves everybody up. Then there are days off and sickness.

Q You mean even though there is a relief sergeant to cover personal leave, vacation leave, a sergeant in, let's say, the garage-yards assignment might be called in to cover messhall even though he wasn't the relief sergeant?

A Right.

Q Did you participate in the 52-hour training program given at Ossining in 1971-1972?

A Yes, I did.

Q Would you just tell the court briefly what subject

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matter was covered in that course?

A I taught one of the subjects, which is employee rules and regulations. They had defensive tactics, first aid.

Q Did they have fire safety?

A Fire safety, transportation, contraband.

Q To clarify one point, when we say transportation in the corrections context, to whom does the transportation pertain? Who is going where?

A Well, transportation means that inmates are going out of the institution, whether it be one inmate, two inmates or 44 inmates.

Q Is this known as a draft in the trade?

A Yes, it is.

Q At Ossining, by the way, do you have bus loads of inmates going from Ossining to other facilities or to court?

A Yes, we do.

Q Who is in charge of a bus load of inmates who go out of Ossining?

A Usually I am.

Q As a sergeant?

A Yes.

Q If only two inmates or a smaller draft, one or two inmates, go out of the institution, who is in charge of that

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type of draft?

A Two officers, but there is always a sergeant in charge of the two officers and the supervision of the whole group.

Q Go ahead with the course. I didn't mean to interrupt you.

A I got to transportation, security and contraband, and I think we had firearms instruction, but I think they knocked that out.

Q Was there a portion of the course called human relations?

A Yes.

Q What was taught in that portion of the course?

A It had something to do with general -- what happens inside an institution, the human relationship that we have to have with inmates.

Q Was the course given to officers and sergeants or was it limited to officers?

A It was limited to officers.

Q It was just given to officers?

A Yes.

Q Did you participate as an officer or a sergeant at that time in the course?

A I participated as an officer.

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Q This course, just to clarify it, was in addition to the portion of the time you mentioned you spent at the training academy when you first came in, is that right?

A Right.

Q You mentioned during the course of performing sergeant duties at Ossning that you were a shift commander.

A Yes.

Q Did you report to the lieutenant on the watch during this period of time you were a shift commander?

A There was no lieutenant.

Q There was no lieutenant on the watch?

A I was a shift commander. I was a watch commander and shift commander.

Q How long were you a watch commander?

A A whole month.

Q Is there a lieutenant assigned to watch command on the 4:00 to 12:00 shift at Ossining?

A Not at that time.

Q Is there one now?

A Yes, there is.

Q Are there other watch or shift commands other than the 4:00 to 12:00 shift?

A Yes.

Q Are there lieutenants or sergeants assigned to

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those commands?

A Yes.

Q Which -- sergeants or lieutenants?

A Now there is a lieutenant on the 12:00 to 8:00. He is the watch commander. And there is a sergeant, which is the shift commander. On the 4:00 to 12:00 there is a lieutenant. He is the watch commander. And there is a shift commander for the 4:00 to 12:00.

Q When you say 4:00 to 12:00 -- I am talking about the role you played -- is that 4:00 in the afternoon to 12:00 at night or 4:00 in the morning to 12:00 noon?

A 4:00 P.M. to 12:00 A.M.

Q I take it from your testimony that you found the laws, rules, regulations section of the examination to be job related, is that correct?

A Job related?

Q Yes, the first 15 questions.

THE COURT: He did say fifteen.

MRS. GORDON: It is fifteen, your Honor. It is quite correct.

MRS. GREENBERG: Would you please show the questions to the witness?

Q You mentioned the first fifteen questions of the examination during the course of your duties and I believe

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they pertained to laws, rules and regulations. I don't know if the document has been marked in evidence yet but you are absolutely correct, the first fifteen questions do pertain to laws, rules and regulations.

Do you consider that portion of the examination to be job related?

THE COURT: If you want to, look it over.

A Not all. When you say "job related," is that institution job relation or department?

THE COURT: Let me intervene before Mrs. Gordon asks you, to say this: You were the person who said you didn't think that the questions were job related. So perhaps you should tell us what you mean when you say they weren't job related.

THE WITNESS: Let's take question 5. Me as a sergeant.

"The age of an offender can be a deciding factor in determining to which facility he should be sent. This age is determined at which one of the following times?"

Now, as a sergeant, I am not required to know that.

THE COURT: Aside from the question of whether you are required to know it, the next question I would like to ask about: Would it be of any value to you if you did know

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it?

THE WITNESS: No.

Q Do you take any further exceptions to questions 1 through 15?

A Question 8. It says:

"Which of the following persons could through the proper procedures be legally transferred to a state hospital for the mentally ill in the Department of Correctional Services?"

As a sergeant --

THE COURT: Are you saying as a sergeant you never have anything to do with such a question?

THE WITNESS: Right.

Q Sergeant Suggs, didn't you note previously as a sergeant you had principal responsibility for preparing drafts?

A Yes.

Q Have there ever been occasions in your experience where an individual inmate was sent from Ossining Correctional Facility to a hospital for the mentally ill?

A That's true, but I didn't determine whether he was mentally ill.

Q I see. Do you take any further exceptions to questions 1 through 15?

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A Question 13.

THE WITNESS: Do you want me to read it, your Honor?

THE COURT: No. I see it.

MRS. GORDON: I would like to call to the court's attention on the answer sheet there are two questions that are multiple keys. One is 13 and one is 10 on booklet 486-E. The multiple keys resulted from a candidate appeal process.

THE COURT: I don't understand what you mean by multiple keys.

MRS. GORDON: Your Honor, if you will take Plaintiffs' Exhibit 20, which is the final rating key.

THE COURT: All right.

MRS. GORDON: You will see there is one section that is headed 485-E. That is the first booklet. Under 485-E if you look down you get to item 13 and you find A, C and D. Under 486-E you look down the list and you find 10 C and B. Those are called multiple keys in the Department of Civil Service.

THE COURT: It applied to more than one thing?

MRS. GORDON: That's correct. Those result from the candidate review process.

THE COURT: I see.

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Q Sergeant, have you finished on 1 through 15? I don't want to interrupt you.

A Yes.

Q By the way, Sergeant, do you know what your test performance was on those first fifteen questions of the examination?

A No, I don't.

Q I would like to take you to the two questions you mentioned on direct examination. That would be question 33 in Plaintiffs' Exhibit 18. I believe you stated on direct examination there were certain areas of the institution which had vocational shops and industrial shops, is that correct?

A Not any more.

Q Not any more, not at Ossining?

A Right.

Q With respect to question 32, the correction officers whom a correction sergeant supervises, are they not his subordinates?

A Right.

MRS. GORDON: I think that's all, your Honor.

THE COURT: Any further questions, Mrs. Greenberg?

MRS. GREENBERG: Yes.

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REDIRECT EXAMINATION

BY MRS. GREENBERG:

Q I am not going to go through all of these questions but I am going to ask Mr. Suggs about a couple more of the questions on the part he was previously examined on.

I would like to start with the first question on the examination.

A This one?

Q Yes. Would you read the question, please?

A "The superintendent of a correctional facility is appointed by which one of the following individuals or groups?"

Q Thank you. Is the answer to that question something which you would need to know to perform your duties as a correction sergeant?

A No.

Q I would like to ask you about the next question. Would you please read that?

A "Which one of the following types of facilities must be on a site approved and controlled by a department other than the Department of Correctional Services?"

THE COURT: Mrs. Greenberg, questions like this I think you can ask me to take judicial notice of in regard to non-relatedness, but it doesn't really take somebody even with this gentleman's experience to make me believe

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that the appointment of a superintendent and how that happened isn't very useful in performing his job and I don't want to stop you.

MRS. GREENBERG: I did not want to leave the impression that the three questions which were mentioned before were the only ones which Mr. Suggs felt were not related to his job.

THE COURT: In any event, his answers are certainly without prejudice to your argument whether he said they are related or not. They are not related.

MRS. GREENBERG: All right. Thank you.

THE COURT: What about number 4, Mr. Suggs? I would like to find some that do relate to your work. Does number 4 relate to your work, talking about giving out the employee rule book?

THE WITNESS: Yes.

THE COURT: That would be useful, wouldn't it?

THE WITNESS: Yes, it would be.

THE COURT: Do you see any others that right offhand you agree do relate to your work? Number 7, does that relate to your work?

THE WITNESS: Yes, that is job related.

THE COURT: Thank you very much. I understand.

MRS. GREENBERG: No more questions.

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THE COURT: Thank you, Sergeant.

(Witness excused.)

MRS. GREENBERG: The plaintiffs call Nathaniel Hayes as the next witness.

N A T H A N I E L H A Y E S, one of the plaintiffs, being first duly sworn, testified as follows:

THE COURT: Mr. Hayes, sit down and keep your voice up in answer to the questions.

DIRECT EXAMINATION

BY MRS. GREENBERG:

Q Would you please state your address?

A 187-08 Foch Boulevard, St. Albans, Queens.

Q Would you please state your race?

A Black.

Q What is your age, Mr. Hayes?

A Forty-five.

Q By whom are you presently employed?

A New York State Department of Correctional Services.

Q In what position?

A Provisional sergeant.

Q When were you appointed to that position?

A August, '72.

THE COURT: Where are you -- Ossining?

THE WITNESS: Yes, sir, Ossining Correctional

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Facility.

THE COURT: Incidentally, when you live in St. Albans, how do you travel to work?

THE WITNESS: I drive it every day.

THE COURT: You do?

THE WITNESS: Yes.

THE COURT: I guess that is no worse than my coming down from Chappaqua.

Q When did you first become employed by the Department of Correctional Services?

A April, 1971.

THE COURT: Is that as a correction officer?

THE WITNESS: Yes, sir.

MRS. GREENBERG: I would like to introduce into evidence Plaintiffs' Exhibit 22, which consists of documents copies at Ossining from Mr. Hayes' personnel file.

THE COURT: Is it stipulated these are copies?

MRS. GORDON: Yes, your Honor. There is no objection.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 22 was received in evidence.)

Q Would you please tell me how much formal education you have had, Mr. Hayes?

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A I graduated from high school, which happened to be a trade school in the culinary arts.

THE COURT: After high school what?

THE WITNESS: I graduated from high school, which happened to be a trade school in the culinary arts.

THE COURT: I see. That means you are a good cook, I take it?

THE WITNESS: Fair.

A (Continued) I also attended Westchester Community College, which I was trying to obtain an associate degree in correction administration. I also attended St. Lawrence University, took a course there in crime and delinquency, got a certificate from there.

By the way, Westchester Community College, I obtained some thirty-odd credits. I had to drop out due to family problems.

Q What subjects?

A Correction administration, correction law, crime and delinquency, psychology, sociology, math and English. College math and English.

THE COURT: How recently was that?

THE WITNESS: That was in 1964.

THE COURT: Were they on the new campus yet or in White Plains?

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THE WITNESS: In White Plains, Valhalla.

Q Where were you employed before you were employed by the Department of Correctional Services?

A Before I came to the Department of Correctional Services, I worked for the New York Mental Hygiene as a security officer there for a year, and prior to that I worked in a bank as a guard seven years.

THE COURT: In the city, what department did you say?

THE WITNESS: Department of Mental Hygiene. One year I worked for them.

THE COURT: In a hospital?

THE WITNESS: In a hospital, yes, a narcotic hospital.

Q For what period of time were you a correction officer?

A From 1961 until '72, August.

Q What job assignments did you have as a correction officer?

A Well, the first year I was assigned to a wall post. That's maintaining security throughout or within the wall posts, challenging anyone that may approach, seeing to it that all the various articles on the post are in good condition, having knowledge of weapons, and then from there

I was relieved of those duties and brought down to the population, meaning that I worked in various areas within the institution. I may have been assigned to the messhall, a housing block, the yards. At that time we had industry. I may have been assigned to one of the shops as relief for the officers. I may have been assigned to the chapel.

THE COURT: Can we perhaps shorten this by asking you whether you recall any work done by a correction officer that you didn't do while you were a correction officer?

THE WITNESS: I beg your pardon, sir?

THE COURT: Is there anything you know that a correction officer did that you didn't do?

THE WITNESS: No, there is very little. In fact, I can't recall anything that a correction officer does, and that also includes transportation, taking inmates on funeral visits and hospital visits.

THE COURT: Am I correct in understanding from what everybody says today that if you there long enough you do everything that the job requires?

THE WITNESS: If you are qualified.

Q What kind of supervisory evaluations did you receive as a correction officer?

A All satisfactory.

Q Did you take any in-service service training or

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education courses while you were a correction officer?

A Outside of the college -- the correction administration course I was taking, that's about it.

Q Did you attend the law enforcement officers training school at Camp Smith?

A I am very sorry. It slipped my mind. I also attended the FBI course in defensive tactics.

THE COURT: Is this the one Mrs. Greenberg asked you about?

THE WITNESS: Yes. Defensive tactics, that is the name of the course. I also attended the police defensive tactics instructors course. That is also given by the FBI, which I was sent to and took.

Q When was that?

A That was in 1972.

Q Was that after you became a provisional sergeant?

A That was before I became a provisional.

Q Have you worked as a counsellor with the inmate population?

A I have done some counselling with the inmate population. Approximately six years ago, I believe, I was doing a little group counselling with the inmate population. It was approximately a year.

THE COURT: Did you have any special training for

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that?

THE WITNESS: No, this is something I read a couple of books on my own to give me the basic foundation to do this type of work; and then I approached my superintendent, writing him a letter, also verbally, requesting that I do be sent to school so that I could further my knowledge in this line of work, but he said no, he couldn't spare me at that time.

And I also requested that other officers get involved, too, because I felt there was a need for this type of work, and I was also turned down at that.

So due to frustrations after a year of trying to further myself and not getting anywhere, I just gave it up.

MRS. GREENBERG: I would like to point out to the court in Plaintiffs' Exhibit 22 a letter written by Mr. Hayes to -- it can't be read --

MRS. GORDON: I have a clear copy, Mrs. Greenberg.

THE COURT: Could you tell us who it appears to be addressed to?

MRS. GORDON: It says "Dear Sir", your Honor, but it has a stamp received, warden's office.

MRS. GREENBERG: It is a letter to which he refers in which he asks for training as counsellor.

MRS. GORDON: It is dated February 2, 1969.

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Q Is this the letter that you refer to?

A Yes, it is.

MRS. GREENBERG: Let the record show that the letter I showed to the witness is a letter dated February 2, 1969, that is included in Plaintiffs' Exhibit 22.

Q While you were a correction officer, did you do any work at the state training academy?

A Yes, I did. I was involved in the -- right after the Attica riot, they wanted to get some minorities into the Attica Prison, trained correction officers. So they established a 13-week training program which was located -- we were using the state troopers -- state police facilities at that time. This was in 1972, months of March through June -- well, May through June.

I was involved as a counsellor working with the trainees up at the academy, and this was the first 13-week training program that the state ever had training these minorities, sending them into Attica Prison.

Q Did you, during the period you were still a correction officer, do any other work at the training academy?

A Excuse me. May I also add it wasn't a complete minority class. There were whites also included, but the emphasis was on getting minorities in there.

Q Was another 13-week course given at the training

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academy during the period that you were still a correction officer?

A No, the next course that was given I had received my probationary -- provisional appointment as sergeant, and the next course was given the year '72, the month October, and that's when they started the continuous training of the 13-week programs of minorities and asked me to come up there and to work in the capacity of sergeant at the training academy.

Q Were you permanently assigned to the training academy starting in October, 1972?

A Yes, I was permanently assigned to the training academy.

Q For how many months, do you remember?

A I stayed up there until April of '73.

THE COURT: Six months?

THE WITNESS: Yes, sir.

Q What did you do during that period at the training academy?

A I supervised the counsellors that were working with the trainees; I also taught a couple of classes; I instructed -- being that I had taken the instructors course, and basically that's what they wanted me up there for, to instruct in defensive tactics, teaching the trainees unarmed

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defense, and I also taught a couple of other classes. Group counselling was one of the things I held in the evening while I was there. And I also taught --

THE COURT: Did you teach group counselling?

THE WITNESS: I held groups.

THE COURT: For the purpose of teaching how to do it?

THE WITNESS: No.

Q What was the purpose of these groups?

A The purpose of any type of group like that basically is to teach people to become aware of one's self and other people, too, to make them aware of human relations, the feelings of other people.

Q Why is that important for a correction officer?

A It is very important because what you are dealing with is people, and people have various emotional problems and various types of attitudes, and this is what you have got to learn how to deal with.

Q When you left the training academy, did you return to Ossining?

A Yes, I did return to my original facility.

Q Why did you leave the training facility?

A Because I was having a little domestic problems because I was away from home so long that I had to get

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back home.

THE COURT: You couldn't drive to Albany every day, I take it?

THE WITNESS: No, sir. We only came home weekends.

Q Then you have been a correction sergeant at Ossining in two different periods?

A Yes, that is correct.

Q During the period from August, when you were first appointed, to October, 1972, when you went to the training academy, what assignments did you have as a correction sergeant?

A I think I only held one assignment at that time, and that was the supervisor in charge of Housing Block B and the chapel in 5 Building at the particular time.

Q Since your return to Ossining in April or May, what assignments have you had?

A Well, I have also -- I have had that assignment, reassignment, again. I have also been assigned to the mess-hall; I have also had the assignment of special housing, the special housing block, and Housing Block A.

I have also been assigned to the duty desk, and my last assignment was yards and recs.

Q During the period you have been with the Department of Correctional Services, have you received any letters of

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commendation?

A Most of my letters of commendation came from the academy where I was working. I don't remember being acknowledged within my institution unless it was some time ago.

Q I would like to show you this letter dated June 7, which is included in Plaintiffs' Exhibit 22.

THE COURT: What year is it?

MRS. GREENBERG: June 7, 1972.

Q Would you please tell the court what that is?

A Yes. This is a letter of commendation from Mr. John E. Van de Car, who was Director of Manpower, commending me on the work I did in the 13-week training period at the academy.

Q I would like to show you a letter dated April 6, 1972, included in Plaintiff's Exhibit 22. Would you please tell the court what that is?

A This is a letter from William Ciuros, Jr., who at that time was the lieutenant in charge of the training academy, and he sent me this letter of commendation for a 13-week training program at the state troopers academy.

THE COURT: Mrs. Greenberg, you can call them to my attention and I will look at them.

MRS. GREENBERG: I would like to call to the court's attention a letter dated October 3, 1966, addressed to

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Honorable Paul McGinniss, the Commissioner of the New York State Department of Corrections, from James J. Dwyer, Commissioner of Public Safety, City of White Plains, commenting on an action taken by Nathaniel Hayes and three other correction officers.

Would you mark this Exhibit 38 for identification, please.

xxx (Plaintiffs' Exhibit 38 was marked for identification.)

MRS. GORDON: Excuse me. Is 38 that Schubin letter?

MRS. GREENBERG: Yes.

Q Would you please tell the court what this is?

A This is another commendation from our superintendent, Theodore Schubin.

Q What is the date of that letter?

A The date is April 6, 1973.

THE COURT: Addressed to you, I take it?

THE WITNESS: Yes, sir, addressed to me.

MRS. GREENBERG: I would like to offer this in evidence.

THE COURT: Any objection, Mrs. Gordon?

MRS. GORDON: No, your Honor.

THE COURT: Received in evidence.

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(Plaintiffs' Exhibit 38 was received in evidence.)

Q Have you helped to organize or conduct any special programs at Ossining that were not a regular part of your job?

A About a year ago Sergeant Kirkland and myself saw a need to bring in the Sickle Cell Anemia Foundation or attempt to bring it into the institution to have some of the inmates tested, or tested those that wished to be tested. They had no type of testing like that in the hospital, so there was a definite need, being that over 75 per cent of the population in the institution are of minority, black and Hispanic, and this disease does affect them the most. So we heard -- we went outside and got in touch with this foundation and requested that the superintendent allow us to do this and, with his permission, we proceeded to get the Foundation and bring it into the institution and set it up and had quite a few of the inmates tested, which they found that out of, I think, about 300 or 400 inmates that got tested, at least 15 or 20 of them did have signs -- traces of the disease.

Q Have there been any other programs which you have organized or tried to organize at the institution?

A Well, Ed and -- Sergeant Kirkland and myself always felt that there must be some reason why so many of these

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men who are released from the institutions consistently come back, and wefelt there must be some other way of or some way of helping these men when they are released from the institution and we also had this in the back of our mind to try to set up some type of program like this.

So after attending one of the classes that was given to the senior correction officers, I also attended that school about two years ago. One of the things that they emphasized were pre-release programs, and we felt that if we established some type of program like this, that we would get some kind of cooperation from the state in helping us with this.

So Ed, myself and his wife, who is the director of this particular program, sat down and wrote up a proposal for Halfway House. The name of this particular program that we had is Halfway -- Rehabilitation: Phase Halfway, Inc., which Ed Kirkland happens to be on the board of directors and myself.

So we established this program and we got funded by ASA, and we have a building of our own now down on East 4th Street and Avenue C, and we are still in the embryonic stage because we are not housing any inmates right now but at the same time we do have ex-inmates that are on our staff and working for us. Some of them were in the

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institution no more than a couple of years ago and they came to us for help and we helped them. We gave them a job. We have men coming out now. We have an inmate that came out about a week ago, and he came down to our program and we put him to work. He is helping -- he is rehabilitating the place. The man has so many skills that it's almost unimaginable. It was just going to waste.

THE COURT: Do you consider this work important to society?

THE WITNESS: I wouldn't compare it to any of the other programs. I feel Ed and I have an interest in what we are doing that no one else has and we will be successful.

Q What have you done to date in terms of assisting inmates through the program?

A Up to now we've placed over 140 people, given them jobs, from our program.

THE COURT: Over what period of time is that?

THE WITNESS: This is over a period of not even a year; approximately a year. I guess around six months.

Q Do you have inmates in residence at this time?

A Yes, which I failed to mention. We have two inmates that's working on our staff.

THE COUNT: You said that, but do you have any that aren't working on your staff?

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THE WITNESS: In residence, no, sir.

Q How is the program going to work? You said it is in the embryonic stage.

A The program will work this way: A man has three months to go before he is paroled out and through a screening process he will be paroled and released to us.

Q Into your custody?

A Into our custody. We will pick him up, which we also have transportation where we will be picking these men up at various institutions and house them in our facility during this three-month program, of which we will find a job for him or attempt to find a job for them, try to help him get back with his family in some way.

We have professional people on your staff, by the way, your Honor, and try to teach him some type of skill, if we can, within that time.

Q Do you hold -- I am sorry.

A This three-month program, the program doesn't stop at the end of three months, because we will have a follow-up of these people for at least a year. Any time they have any problems while they are outside of our program, they can always come back to us and call on us. The door is open 24 hours a day.

Q What is your official position?

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A I also want to add that this program isn't just set up for minorities but for inmates, period, that come out of the institutions that need some place to go.

Q What is your official position with this program?

A I am on the board of directors; I am the president.

Q Do you receive any compensation?

A None whatsoever except satisfaction that I am able to help these men.

Q You mentioned that you have funding from ASA, which I believe is the New York City Addictive Services Administration, is that correct?

A Yes.

Q Is this a narcotics program?

A No, it's not.

Q Did you take examination number 34944?

A Yes, I did.

THE COURT: Before we get into the exam again, why don't we take a short recess.

THE CLERK: The court will take a ten-minute recess. All rise.

(Recess.)

THE COURT: All right.

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DIRECT EXAMINATION (CONTINUED)

BY MRS. GREENBERG:

Q Mr. Hayes, did you take examination number 34944?

A Yes, I did.

Q Did you receive a passing grade?

A Failing grade.

Q Did you take the 1970 sergeant's examination?

A Yes, I did.

THE COURT: The one you are talking about was in 1972, right?

THE WITNESS: Yes.

Q Did you receive a passing grade on the 1970 examination?

A I failed that also.

Q Did you take the examination prior to 1970?

A Yes, I did.

Q Did you take the sergeant's examination every time it was offered during the period when you were eligible to take the sergeant's examination?

A Yes.

Q Did you ever receive a passing grade on the examination?

A No, I failed all of them.

Q Why are you challenging the 1972 examination?

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A Well, I am challenging this because I feel that, first, I have been performing in the capacity of a correction officer with a satisfactory rating since I have been within the department, and that is for thirteen years; I have been functioning as a sergeant. I don't even like to refer to myself as a provisional because the work that I am doing within my institution is the same as the other sergeants that are there.

So I have been performing in that capacity for quite some time throughout the institution and I know my job and I know the sergeant's job and I know the institution, I know the books, the rule books, and I feel that because of some little exam that's given by the state, Civil Service Department, and because I wasn't able to pass this exam in writing, that all the performances that I have done in the past working in the capacity also as a sergeant and performing and doing satisfactory work, never receiving an unsatisfactory rating, the commendations that I have been receiving, and because I failed this exam, this states that I am not qualified to be a sergeant. That's why I am challenging this.

And I have been failing for the last four years and I don't have a complex either. That's why we keep taking it. I am trying to pass. At the same time, because

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Q I was asking about Ossining.

A I am sorry. We don't have any black permanent right now employed in Ossining.

MR. KANTOR: Could Mrs. Greenberg specify what she means by permanent? Does she mean permanently or permanent but for this court's restraining order?

THE COURT: I take permanent to mean non-provisional.

MRS. GREENBERG: That is what I take permanent to mean.

MRS. GORDON: As a result of your order, everyone who was promoted from the 1972 examination list is a provisional.

THE COURT: That doesn't affect people, at least the blacks. The blacks were not promoted. The question relates to the blacks.

MRS. GORDON: Blacks were held in by virtue --

MRS. GREENBERG: May I?

THE COURT: You shouldn't have any problems communicating with each other.

Q Of the persons who were made provisional sergeants in April of after on the basis of their ranking on the eligible list at Ossining, do you know how many were black?

A Just one.

Q What is his name?

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of my failing they tell me that I can't obtain the position of a sergeant. That's why I am challenging it.

Q Do you know people other than yourself who are good sergeants and failed the examination?

A Yes, I do.

MRS. GORDON: I would like the record to reflect the same objection I made before.

THE COURT: Yes, same ruling.

Q When you first went to Ossining in 1961, about how many black -- well, officers at all ranks were there at Ossining?

A There were only approximately 25, 20 or 25, blacks at that particular time employed as correction officers in our institution.

Q How many Hispanics were there?

A There weren't any Hispanics.

Q How many of the blacks who were at Ossining in 1961 held ranks above that of correction officer?

A We didn't have any.

Q At the present time, how many blacks and Hispanics hold ranks, permanent ranks, above that of correction officer?

A Oh, we have one black lieutenant who is employed in Greenhaven.

A Ribiero.

THE COURT: What rank?

THE WITNESS: Michael Ribiero. He is a sergeant.

THE COURT: You said he was made a provisional in April?

MRS. GREENBERG: But for the temporary restraining order he would have been appointed.

Q Between 1961 and the time Sergeant Ribiero was appointed, were there any blacks or Hispanics holding permanent rank above that of correction officer at Ossining?

A Yes, for a short span of time, Sergeant Hill was appointed at Greenhaven. He was appointed at our institution. That is how he got down there as sergeant. And then from there he transferred to Greenhaven.

Q Do you know whether Mr. Hill is still a sergeant?

A No, he is a lieutenant now.

THE COURT: He is not at Ossining, is that right?

THE WITNESS: No, sir, he is back at Greenhaven.

Q Do you know of any other blacks or Hispanics in the statewide system who hold permanent rank above that of sergeant?

A There is one other.

THE COURT: Let me ask: Do you purport to know how many blacks there are in such positions statewide?

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THE WITNESS: Yes, sir.

THE COURT: All right.

BY MRS. GREENBERG:

Q I am sorry. If I said above the rank of sergeant I meant above the rank of correction officer.

A Only one other.

THE COURT: Only one other permanent appointee in the rank of sergeant or above who is black throughout the state?

THE WITNESS: Yes, sir.

MRS. GREENBERG: Or Hispanic.

THE WITNESS: This man is on leave of absence now from our department.

THE COURT: This is something you shouldn't have any dispute about.

MRS. GORDON: Frankly, statistical background being what it is, I can't follow it in testimony. The charts we presented today as plaintiffs' exhibits reflect the statistics and it is more convenient to go back to the charts than do it by this method. I don't see why this is necessary, to start with.

THE COURT: I am not sure it is.

Isn't this all in the record somehow or other?

MRS. GREENBERG: What is in the record is the

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present racial composition of the department. I am trying to establish the -- the defendants have maintained they cannot tell us historically how many blacks have been sergeants.

THE COURT: You mean in the past?

MRS. GREENBERG: Yes. I asked in the period between 1961 and the present time.

Q Whether you have known of any -- let me rephrase the question.

Have you known of any other blacks or Hispanics to hold the rank above that of correction officer from the time you started to the present time?

A Just those two.

Q Just those two?

A Yes.

Q What are their names?

A Hill -- Clayton Hill and Dave Harris.

Q How do you know about the racial composition or the number of blacks and Hispanics in the Department of Correctional Services?

A Outside of knowing the few blacks in the department personally, I know them, and being that I was working in Albany I got a few statistics pertaining to this because I was naturally interested in knowing just how many black

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supervisors we had within the department, male.

Q Would you tell me about your role with respect to the -- would you describe briefly the Brotherhood of New York State Correction Officers?

MRS. GORDON: Objection.

THE COURT: On what ground?

MRS. GORDON: Your Honor, unless it pertains to some aspect other than the Brotherhood's role as plaintiff in this case, I would have no objection.

THE COURT: I assume it does. The implication I got from the question was Mr. Hayes had worked in the organization and therefore acquired certain information.

MRS. GORDON: I withdraw my objection, if that be it.

A Well, I was one of the founders of the organization that helped organize it, build it, and then I became -- then I came on the board of directors of the organization.

Q What were the purposes of the Brotherhood?

A The purpose of the Brotherhood was --

THE COURT: I really don't think we need that. It is just to indicate the source of his information.

In the course of your work for the Brotherhood, did you acquire your knowledge about the number of blacks in the department?

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THE WITNESS: Yes, sir.

Q Have you spoken to any black officers about this lawsuit?

A Yes, I have.

Q Can you estimate the number of black officers or Hispanic officers to whom you have spoken?

A It's hard to say just how many because I was continuously speaking to various officers about this suit. We have hit just about every minority, almost every minority within our institution, speaking in some way.

Q Have you spoken to Hispanic officers as well?

A Yes, black and Hispanic.

Q Have any of the minority officers to whom you have spoken told you that they are opposed to the goals of this lawsuit?

A I was approached by maybe one or two.

Q Can you tell me their names?

A Well, one happened to be Michael Ribiero, who is a sergeant now working, and the other was Smith, that's on the list.

THE COURT: Is he a provisional or what?

THE WITNESS: No, sir. He is a correction officer but he passed the exam.

THE COURT: I see.

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Q Have any of the officers to whom you have spoken, that is, minority officers, told you that they are in favor and supporting this lawsuit?

A Many of them.

Q What are your goals in this lawsuit?

A To try to establish a different system of preparing and giving exams for promotional opportunities, one that won't alienate, in a way, the minorities, black and Hispanics, that's on the job now.

At the time there's a minority recruitment program that's existing up in Albany right now headed by Dr. Bush, who is heading this program --

THE COURT: Can I interrupt? I certainly don't want to stop Mr. Hayes at an appropriate time from giving this information, but this doesn't have to deal with whether there have been any illegal acts so far.

MRS. GREENBERG: I have no more questions.

CROSS EXAMINATION

BY MRS. GORDON:

Q Mr. Hayes, you mentioned that you attended St. Lawrence University, Westchester Community College, a FBI course and quite a few other courses, as I recall it.

A Yes.

Q Were all the courses you attended under some

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program sponsored by the Department of Correctional Services?

A No.

Q Which ones weren't?

A Westchester Community College.

Q Did you do that on your own?

A I did that on my own.

Q Was that a tuition reimbursed program?

A No. They gave you a few funds for books. I think it was approximately $50.

Q Who is "they"?

A The department.

Q Did you have to pay tuition?

A Yes.

Q And you paid that out of your own pocket, right?

A Yes.

Q How about St. Lawrence University?

A St. Lawrence University was a program that was sponsored by the department. I didn't have to pay anything.

Q The FBI program, was that a state sponsored program for you?

A State sponsored.

Q I believe you mentioned that you went to the training academy sponsored by the State Correction Department when you first came into the service, is that correct?

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A No.

Q Did you go to a correction officer training program sponsored by the Department of Correctional Services at any time?

A At any time?

Q Right, at any time.

A You mean a training academy like the one we have in Albany?

Q Yes.

A No, sir, I never had the opportunity. This is one of the things that I wish we had when I first came on the job.

Q Did you participate in a 52-hour in-service training program in 1971-1972 at Ossining sponsored by the department?

A No. I participated in the academy.

Q You participated --

A Because the same programs that were given in the academy were given in the institution.

Q Did you go to the academy for the purpose of taking an in-service training program?

A No, I just took advantage of the opportunity while I was there to get this training which I was missing out within the institution.

THE COURT: I am getting a little mixed up.

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You did take the equivalent of the 52-hour program at Albany, is that right?

THE WITNESS: Yes, sir.

THE COURT: O.K.

Q Are you aware of whether or not there is a management supervision course, an in-service course, on that level given for supervisory personnel by the Department of Correctional Services?

A Am I aware of that?

Q Yes.

A No, I am not.

Q I take it from that you never attended such course?

A Management --

Q And supervision.

A And supervision. No, I didn't take that course.

Q Do you know whether or not there is such a course available?

A Not offhand I don't.

Q Counsel, in the course of your testimony, referred you to certain letters that have been written to the warden or some to you. I would like to go over that briefly with you for a moment, if I may.

A letter of September 30, this is in Plaintiffs'

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Exhibit 22, September 30, 1969, you wrote, and this is the one that says received at the warden's office. It says "Dear Sir," though. I assume you are writing to the warden.

"For the first time in all my nine years as a correction officer I really feel I am an instrument in helping the rehabilitation of inmates. I truly feel that the groups are the best thing that have happened to this department for a long time. I just hope one day we will be able to involve more inmates and officers."

And then you go on and say:

"My primary reason for writing is to invite you to the next group counseling meeting."

Then in February --

THE COURT: Is there a question about it?

MRS. GORDON: There will be in a moment, your Honor.

Q In February of 1969, you wrote again: "Dear Sir." We assume to the warden.

THE COURT: February would be before?

MRS. GORDON: Yes, that would be before. The September 30 letter obviously was second and this was first.

Q "Dear Sir:

"There has been more communication between officer and inmate here at Sing Sing then ever before. This

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relationship is due to the wonderful change in the system of things and the increase in various rehabilitative programs that were introduced by you and your staff. I am now involved in group counseling, as you know, and I feel that I have a fair communication with my counselees. Mr. Contreras is doing a fine job in guiding me."

And then you close:

"Even if I were sent to the academy at Matteawan some of the courses given there might be beneficial to me."

I assume one of the purposes of this letter was to get the superintendent to send you to the training academy, which was then at Matteawan, is that correct?

A Right.

Q In view of these two letters in February of 1969, I take it is not your position that group counseling was not going on at the institution at that time?

A Rephrase that again, please.

Q Was there group counseling going on at the institution in February and September of 1969?

A Yes, I had a group at that time.

Q You had a group?

A Yes. That's why I was requesting to go to school so I could further my knowledge.

Q You didn't institute this program at Ossining,

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did you?

A I instituted this group counseling program, the one that I was heading.

Q You say here that"Mr. Contreras is doing a fine job of guiding me,in guiding me along the way."

A Right.

Q You instituted the program but Mr. Contreras was supervising you and guiding you in your counseling efforts, is that correct?

A I will explain to you Mr. Contreras' position. He was heading the service unit and they put my group under his particular auspices. So, therefore, he was with the group my direct supervisor who I had to go to and ask for whatever books that I may have needed to try to further the project, but directly I was the one that instituted this program.

Q You were the group counselor?

A I was the originator of the program.

Q What position did Mr. Contreras hold at that time?

A He was in charge of the service unit, senior officer in the service unit.

Q Will you tell us briefly what the functions of a service unit were in 1969 at Ossining?

A The function of a service unit?

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Q Yes.

A Well, the service unit in 1969 handled inmates, various problems, domestic problems. Any time an inmate wanted to contact his home he would go to the service unit. If he had some type of marital problems, the service unit would handle that. If he had difficulty with his visits, the service unit was the one that screened the visits, that gave the O.K. and decided who this inmate would be allowed to visit, whether it be his common law wife or his wife or his mother and father. They were the ones that decided whether this was the inmate's girlfriend or boyfriend, whoever it may be.

Q Were there line officers in charge of that unit at that time?

A Line officers?

Q Yes, sergeants, lieutenants, officers.

A No.

Q As part of Exhibit 22 there is a series of letters concerning an incident which occurred in September of 1966 wherein apparently you and several other correction officers assisted in making an arrest or some such.

Did you subsequently report that incident to the superintendent at that time?

A Yes, I did. A-405

Q I am just trying to find the letter. As set forth in this letter, which is part of Plaintiffs' Exhibit 22, is that your signature at the bottom there?

A Yes.

THE COURT: What is the date of that?

THE WITNESS: September 21, 1966.

THE COURT: I have got it.

Q Mr. Hayes, did you in fact write this letter?

A It's typed.

Q Yes, it's typed. Did you compose that letter or was it done by one of the other gentlemen who signed it?

A It was a collective thing by the officers that were involved. I would never have written a letter.

Q Which one of you drafted it?

A I think Mr. Ben Thompson drafted it.

MRS. GORDON: May I have Exhibit 38?

Q Counsel showed you a letter from Superintendent Schubin dated April 6, Plaintiffs' Exhibit 38, wherein he closes: "I would wish to advise you that I would recommend you for a permanent appointment at this or any other institution should the occasion arise," is that correct?

A Yes.

Q Mr. Hayes, didn't you on or about April 4 receive notice that you would be reverted from your correction

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sergeant rank back to your correction officer rank by virtue of the availability of the eligible list?

A Yes.

Q On or about April 4th?

A Yes.

Q Was this communication from the superintendent as a result of that notice to you that you were going to be reverted to your permanent rank?

THE COURT: Was that communication as a result of that?

MRS. GORDON: Yes.

THE COURT: How can he tell that? He didn't send it.

Q Do you know what the occasion was for your receiving this note?

A The commendation?

Q Do you know what the occasion was for your receiving this note from Superintendent Schubin?

A Do I realize what the occasion was? No, I don't offhand. Except I had been doing extraordinary work and he recognizes it.

Q But on or about April 4th you did receive notice that you were going to be reverted to your correction officer rank, is that correct?

Q Did you in fact receive a copy of that letter?

A I didn't finish reading the letter. I am sorry. Excuse me.

I am aware of this.

THE COURT: You mean you received it?

THE WITNESS: Yes, sir.

MRS. GORDON: I don't want to go into detail on this letter. I want to put it in evidence.

THE COURT: That is a letter from Warden Denno?

MRS. GORDON: To M . Hayes.

THE COURT: What is the date of it?

MRS. GORDON: March 31, 1965.

THE WITNESS: Sent then --

THE COURT: Just a minute.

Has it got a number?

MRS. GORDON: It doesn't at the moment, your Honor, but I would like it marked Defendants' Exhibit BB. If counsel wishes, I will also put in the letter of Mr. Hayes to the warden, if you think that would clarify things. Why don't we do that?

THE COURT: Put them both in as one exhibit.

MRS. GORDON: So we have common sense logic here.

THE COURT: Which comes first?

MRS. GORDON: Mr. Hayes' letter to the warden.

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A I did receive a notice. I am not sure of the date, though.

Q Was it the beginning of April?

THE COURT: I am aware of the fact both these events occurred about the same time.

Q As part of Plaintiffs' Exhibit 22 there are certain suggestions in the letters that you wrote to the warden, and so on, about programs or invitations, what have you. Was there a time when you also made a suggestion to the warden that correction officers, members of the correctional staff, be permitted to bring firearms into the institution at Ossining?

A Yes.

Q And did the warden make any judgment with respect to that suggestion?

A He said that it was out of his hands, only Albany could handle it.

Q Mr. Hayes, would you please look at this letter dated March 31, 1965, to you from Warden Denno.

Did you receive a copy?

MRS. GORDON: Your Honor, that is not in the exhibits.

THE COURT: It is not?

MRS. GORDON: No.

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MRS. GREENBERG: What is the date of the warden's letter?

MRS. GORDON: March 31, 1965. There may have been more than one letter for Mr. Hayes on this matter.

THE COURT: But you are putting one in?

MRS. GORDON: I am putting one in. I can't quite read the date on this exhibit.

Would you please mark that Defendants' Exhibit CC.

THE COURT: Make them both one.

MRS. GORDON: Yes. CC instead of BB.

(Defendants' Exhibit CC was received in evidence.)

THE COURT: I would just as soon look at that briefly now.

MRS. GORDON: Sure. I am not continuing with this line of questions now.

THE COURT: I gathered that.

(Pause.)

THE COURT: All right.

THE WITNESS: Excuse me, your Honor. May I make a statement in reference to that letter?

THE COURT: Yes.

MRS. GORDON: If the court permits.

THE WITNESS: That letter only reflects the feelings

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that I have always had about conditions that exist --

THE COURT: Your own letter, you mean?

THE WITNESS: Yes, sir, my letter. Conditions that existed within the department at that particular time. I felt that there was a need, being that we were and still are peace officers under the Code of Criminal Procedure, 154, and that by being peace officers we had the right to carry and possess firearms anywhere in New York State and that by having this right I felt that I wanted to protect myself at all times and why shouldn't I bring my weapon and have it housed within the institution that I worked.

BY MRS. GORDON:

Q Now, as you indicated, you were appointed a provisional sergeant in April of 1972, is that right -- excuse me -- August of 1972?

A That's right.

Q And you remained one down to date?

A Yes.

Q How much time in that period did you spend at the training academy in Albany versus your present assignment at Ossining?

A Well, I was appointed in August as a provisional sergeant and I stayed within the institution up until October. October I went to the academy and I remained there

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until April of '73. Then I returned to the institution in April, May and June and July up until now.

Q You stated in your testimony and, as I recall, also in your deposition that you had had various assignments at Ossining as a provisional sergeant, is that right?

A Yes.

Q I call your attention to Defendants' Exhibit U wherein you are indicated down at the bottom of the list here with a 2 -- I guess 2 refers to how many individuals -- 2, Sergeants Hayes and McKinnie, Vacation, P.L., sick leave.

THE COURT: Sick leave?

MRS. GORDON: Sick leave.

Q Sick one-half day, one-half pay. That refers to McKinnie, right?

A Right.

Q So your assignment on this day was Vacation - P.L. - Sick Relief?

A Yes.

Q The positions you served in in the institution were those as a result of relieving other sergeants?

A Right.

Q Your assignment has been the same at all times -- your assignment as the relief sergeant has been the same all the time that you have been a sergeant at Ossining,

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is that correct?

A Correct.

Q We had occasion to discuss briefly at your deposition some of the people to whom you reported or who supervised you at Ossining. I just want to ask you whether a Lieutenant Miles was among your supervisors at Ossining.

A He was amongs my supervisors for a short span of time, only approximately two weeks at the most, before he went to the academy to work as a lieutenant.

Q Now I direct your attention to the time you spent at the academy which, as I understand it, is approximately from October of 1972 to April of 1973, is that correct?

A Yes, right.

Q I direct your attention to Defendants' Exhibit D, which at this point I would like to mark for identification. Plaintiffs previously had a copy.

MRS. GORDON: I would like to offer it in evidence if there is no objection to it.

Is there any objection to it, Counselor.

MRS. GREENBERG: No.

xxx (Defendants' Exhibit D was received in evidence.)

Q Mr. Hayes, I call your attention -- by the way, I should note to the court this is the training curriculum

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for March12, 1973, to June 5, 1973.

THE COURT: Right.

MRS. GORDON: Covering obviously a portion of the time that Mr. Hayes was there.

Q Mr. Hayes, I direct your attention to page 3 where I see your name listed under academy staff as Sergeant Nathaniel Hayes, physical training and defensive tactics.

Is that correct?

A Yes.

Q You noted during the course of your direct examination that you performed some counseling functions while you were at the training academy on this particular detail, is that correct?

A Yes.

Q Would it be fair to say that the major portion of your time when you were at the academy during this October to April period was spent in physical training and defensive tactics?

A Yes.

Q Mr. Hayes, with respect to the time when recommendations were made for provisional appointments which took place in the summer of 1972, did you testify at your deposition that Sergeant Scott or someone who was replacing him was the individual who had recommended you to

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Superintendent Schubin?

A Yes, I did.

Q Do you recall who the individual -- looking through Defendants' Exhibit M in evidence, do you find that it was in fact Sergeant Sabolik who recommended you?

A Right.

Q Do you know Sergeant Sabolik?

A I do.

THE COURT: How do you spell his name?

THE WITNESS: S-a-b-o-l-i-k. Subject to correction, your Honor.

He was once employed in our institution as a correction officer.

MRS. GORDON: Wait for me to ask you a question. Otherwise we will get all confused.

Q Did you serve under Sergeant Sabolik at Ossining?

A Yes.

Q You did?

A Yes.

Q You weren't at the academy at the time Sergeant Sabolik came to Ossining, were you?

A No.

Q How long did you work under or with Sergeant Sabolik when you were at Ossining?

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A As a correction officer?

Q At Ossining. Let me rephrase the question.

THE COURT: Why is it so hard?

A I understand. You wanted to know just how long have I served under him as a correction officer?

Q He was the one who recommended you?

A Right.

Q How long did you work for him?

A I didn't work too long for Sergeant Sabolik in his capacity as a sergeant but Sergeant Sabolik also was a correction officer working in Sing Sing or Ossining Correctional Facility for many years, which I worked along, so knowing my capabilities and qualifications, I guess he based it on that.

Q You mean there was a time prior to the summer of 1972 when you and Sergeant Sabolik worked together?

A We were correction officers together.

Q Approximately how long prior to the summer of '72 is the period you refer to?

THE COURT: What period?

MRS. GORDON: The period of time he worked for Sergeant Sabolik?

THE WITNESS: No, worked with him.

THE COURT: There were two periods, one when you

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worked for him for a short period of time?

THE WITNESS: Right.

THE COURT: When was that?

THE WITNESS: That was a short period of time just prior to the time that I went to the academy, I believe. It was about three months, I guess, prior to the time I went to the academy.

Q In other words, you had worked with Sergeant Sabolik at Ossining for approximately three months, give or take --

A Yes, right.

Q -- prior to the time he recommended you for this promotion, is that right?

A Right.

THE COURT: During that period you were working for him, he was a sergeant, is that right?

THE WITNESS: He was a sergeant during that period, yes, sir.

Q Did you work for him during that period, that three-month period?

A Well, a correction officer doesn't directly work for any sergeant.

THE COURT: Then putting it a different way, did you work under him or did he supervise you?

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THE WITNESS: Yes, sir.

THE COURT: What was your relationship?

THE WITNESS: I worked under him, within his area.

Q Where were you assigned at that time and where was Sergeant Sabolik assigned?

A I was assigned at that particular time -- I can't recall offhand just what areas.

Q Do you recall where Sergeant Sabolik was assigned?

A I think he was assigned to the upper hill.

Q The upper hill?

A Yes.

Q Did you work on the upper hill?

A I have worked on the upper hill.

Q In this three-month period prior to --

THE COURT: I don't quite understand what relevance this has to the case.

MRS. GORDON: I will only pursue it for another moment.

THE COURT: Mr. Hayes is not accountable for the reasons Sergeant Sabolik recommended him unless he bribed him.

MRS. GORDON: This is relevant to the case in terms of the recommendation which at that time was a

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recommendation that this officer was qualified to be made a sergeant and on what basis this recommendation was made.

Q Excluding this three-month period when Sergeant Sabolik and you were both at Ossining, hadn't you worked for Sergeant Sabolik prior to 1967, in other words, when was the last time, excluding the three-month period just prior to your recommendation, that you worked with Sergeant Sabolik?

A I think in the years '62 -- when I first came to the institution he was there in '61.

THE COURT: Was he a sergeant there?

THE WITNESS: No, he was an officer.

THE COURT: So you didn't work for him?

THE WITNFSS: She used both phrases. She said worked for and then with.

Q He knew you because you had worked with him before?

A Yes.

Q All I am trying to establish is when the before took place.

A When I first came to the institution.

Q Up until when?

A I guess it must have been four or five years and then he left and went to another institution.

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Q Does it refresh your recollection to learn Sergeant Sabolik went to Coxsackie in '67?

A Yes, and then he came back as a sergeant.

THE COURT: He knew you about five years as a fellow correction officer?

THE WITNESS: Yes.

THE COURT: And then later on he knew you for a short period when you worked in the same area he did, he was a sergeant and you were a correction officer?

THE WITNESS: Yes, sir.

THE COURT: I have got the picture.

Q On your direct testimony, counsel had you elaborate as to the number of blacks and Hispanics at Ossining in 1961 or so -- I assume that's when you first came -- both in the correction officer rank and in the supervisory rank.

Could you now tell me with reference to now, today, for example, approximately how many blacks and Hispanics there are on the correction officer level at Ossining?

THE COURT: Are you testing his knowledge? You have a right to. If that is what you are doing, all right. If you want to bring out the facts, they must be somewhere in the record.

MRS. GORDON: Counsel, it seems to me, quite carefully had the witness testify that in 1961 there were only

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25 blacks and no Hispanics. I think it is of some relevance to establish and to test his knowledge, to find out how many there are today, particularly when it appears that there was a wish to draw some inferences in terms of the --

THE COURT: Mrs. Greenberg put that in the record because there were no statistics on the point. If there are statistics on the point, the only other reason to test his knowledge --

MRS. GORDON: There is one other aspect that is relevant. I have to establish it first.

Q Has there been a sizable increase in the number of black and Hispanic correction officers at Ossining over the years that you have been there?

A Yes, there has.

Q In your complaint you estimated or stated that there were approximately 200 blacks and Hispanics -- I think it was blacks and some additional Hispanics -- who had taken 34944, is that correct?

A At that time I did.

Q Didn't you testify at your deposition that you based that statement on the number of individuals you thought would be eligible to take that particular examination? By "eligible" I mean eligible in terms of length of service.

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A Yes, I did.

Q In your estimation, how many correction officers in 1970 were eligible to take the correction sergeant examination?

A I imagine about half that many.

Q About a hundred?

A Yes. I would say 75. I am sorry.

Q 75?

A Approximately 75.

THE COURT: Which test is that now -- for sergeant?

MRS. GORDON: The '70 examination.

THE COURT: The sergeant exam?

MRS. GORDON: Yes.

Q Whereas you estimated there were about 200 who were eligible to take the '72 sergeant exam, is that correct?

A I think it was 140 took it. 140 throughout the state took it.

Q We can establish by the record how many in fact took it. I just wanted you to estimate in terms of your own knowledge.

A Approximately.

Q What were the reasons for your leaving your assignment at the training academy in approximately April of this year, last year?

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A Basically --

Q It should be April of this year. You can see what a difficult time I have with the statistics in this case. I can't even remember what year it is.

What were your reasons for leaving?

A My main reason for leaving was return home to my family, which I had been away from intimately for over six months.

Q Didn't you also state in your affidavit in this case and at your deposition that you had some disagreement with Captain Sperbeck, who was in charge of the academy?

A I have never had any disagreement with him.

Q Did you have any other reasons for leaving the academy other than that you wanted to be closer to your family?

A You said I stated that in my deposition. I didn't state I had a disagreement with Captain Sperbeck.

Q I am paraphrasing it, I didn't want to trap you.

Did you have any other reasons for leaving the academy?

A None. I enjoyed working there very much.

Q Wasn't there some question that Captain Sperbeck had asked you to submit a resume if you wanted to stay on at the academy, Mr. Hayes?

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A Yes.

Q Were you agreeable to submitting a resume to Captain Sperbeck?

A No.

Q But that formed no motivation in your leaving the academy?

A Of course not.

THE COURT: It might have formed some motivation on his part but not your part.

THE WITNESS: That's correct. I had intended leaving and this is what -- well, what happened, I will explain this --

THE COURT: No.

MRS. GORDON: I think that's it, your Honor. I would like to check for one moment.

(Pause.)

MRS. GORDON: I have just one other thing left. I don't want to take the time in this particular area but since plaintiffs have I am afraid I am obliged to.

Q Counsel asked you on direct examination whether you had talked to any other black or Hispanic correction officers who had participated in this examination with reference to the bringing of this litigation, is that right?

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A Yes.

Q Was there a meeting of the Brotherhood in the beginning of May, 1972, where this was discussed -- 1973?

A Yes.

Q Were all the members of the Brotherhood in agreement with respect to this litigation?

A Those that were there, yes.

Q Those that were there were in agreement?

A Yes.

MRS. GORDON: Thank you.

MRS. GREENBERG: In the interest of clarifying the record, I would like to read just a few figures into the record.

First from Plaintiffs' Exhibit 30. As of May1, 1973, there were at Ossining Correctional Facility 365 correction officers, of whom 151 were black and 24 were Hispanic.

From Plaintiffs' Exhibit 28, referring to the 1970 sergeant's exam, 46 blacks and one Hispanic took the examination.

Referring to Plaintiffs' Exhibit 12, the 1972 sergeant's exam, 103 blacks and 16 Hispanics took the exam.

MRS. GORDON: Mrs. Greenberg, that is 104.

MRS. GREENBERG: Fine. 104 blacks, as it has

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been corrected.

I just have one question.

REDIRECT EXAMINATION

BY MRS. GREENBERG:

Q Mr. Hayes, what is the present rule at Ossining Correctional Facility with respect to the bringing of firearms into the institution?

A Firearms are now allowed to be stored within the institution due to Ed Kirkland and myself that went through a lot of changes to try to have an amendment of that rule to safeguard our weapons.

MRS. GREENBERG: Thank you. I have no more questions.

THE COURT: All right. Thank you very much, Mr. Hayes.

(Witness excused.)

THE COURT: We will adjourn until tomorrow morning at 10:00 o'clock. I may have a short piece of business that I have to finish before that time. I would like to see counsel in the robing room now, though.

(Adjournment to 10:00 A.M., July 24, 1973.)

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EDWARD L. KIRKLAND, etc.

-against-

73 Civ. 1548

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES

New York, New York
July 24, 1973
10:10 A. M.

THE COURT: I apologize for being late.

MRS. GREENBERG: The plaintiffs call as their first witness Jerry Kimble.

J E R R Y K I M B L E, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

THE COURT: Mrs. Gordon?

MRS. GORDON: Your Honor, there appear to be several witnesses in the courtroom on plaintiffs case who may testify about the examination. Frankly, I didn't note that yesterday or didn't realize it. If they are going to testify about their opinions about the examination or particularly the examination questions, I would appreciate it if the witnesses could be excluded from the courtroom because their opinions might have a mutually reinforcing effect.

THE COURT: Is Mr. Kimble going to be testifying on that subject?

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MRS. GREENBERG: Yes, to some extent, and Mr. Holman and Mr. Liburd --

THE COURT: I think it is a reasonable request that they stay in the witness room until their time to testify comes. I would like to get the testimony as objectively as possible.

Mr. Holman and Mr. Liburd, there is a witness room back there. Would you mind waiting until your time comes so we can hear from you independently.

DIRECT EXAMINATION

BY MRS. GREENBERG:

Q Mr. Kimble, would you please state your address?

A 8 Ann Street, Peekskill, New York.

Q What is your race?

A Black.

Q What is your age?

A Thirty-eight.

Q By whom are you presently employed?

A The New York State Department of Correctional Services.

Q In what position?

A At the present, provisional sergeant.

Q When were you appointed a provisional sergeant?

A August 31, 1972.

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Q What date were you first employed by the Department of Correctional Services?

A May 11, 1961.

Q In what position?

A Correction officer.

Q Would you please tell us the extent of your formal education?

A I have one year at Togullo Southern Christian College in Togullo, Mississippi. At present I have about thirty credits toward a BS.

THE COURT: Is that from Togullo?

THE WITNESS: No, these other credits were required. I have been attending weekend courses for C. W. Post. I have attended numerous on-the-job training courses. I have attended two weeks at St. Lawrence University at a correction conference. During that time I participated in the lay group counseling. I also conducted a therapy group, a group session or rap session, whichever way you want to refer to it, at the facility for two years.

THE COURT: At Ossining?

THE WITNESS: Yes, at Ossining.

Q I will ask you about your activities as an instructor later. You might finish up with any other training or education courses that you have taken.

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A I took the instructor's course that was given at the Civil Service Department for the Department of Correction to be an instructor. I am an instructor with the New York State Training Academy.

Q Did you take any other courses that you can recall?

A Not at this time.

Q Would you describe the job assignments that you had as a correction officer?

A Mostly -- when I first went to the department, most of our assignments was relief assignments. You took various jobs. At given times you would be in charge of an area or rec hall or you would have a post which we refer to as the handball court, ballfield, areas of that sort.

Then I was assigned as in charge of a shop, which was the bathhouse. I worked that for a number of years.

Q Was it desirable to be a relief officer? Was it regarded by you as desirable to be a relief officer?

A Well, at that time I felt it to be desirable because it was a way of learning the functioning of the facility. Now, some people probably didn't like it.

Q How did it help you learn the functioning of a facility?

A By getting various jobs you would learn more of how each job would function and it was very beneficial to

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me, I felt.

Q What supervisory evaluations did you receive as a correction officer?

A Satisfactory.

Q Any unsatisfactory?

A No.

Q Did you conduct any counseling sessions with the inmate population?

A Yes, I did. I stated that earlier. About two and a half years I ran what we call a drug rap session group. When we started off we had three or four such groups and I was the counselor for one of them.

THE COURT: Have you been in Ossining all the time you have been in the service?

THE WITNESS: Yes, sir.

Q Did you conduct any training courses yourself at Ossining when you were a correction officer?

A Yes, I did.

Q Would you describe what you did?

A I was one of the instructors with the training program that they had here, and I instructed the class for transportation of inmates.

Q Have you taught at the training academy?

A Yes, I have.

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Q Did you teach there as a correction officer?

A Yes, I did.

Q What did you teach there?

A The same course, transportation of inmates.

Q For how long?

A About three years, three and a half years, I would say.

THE COURT: Was that in Albany?

THE WITNESS: I started in Beacon and when they moved to Albany I continued.

THE COURT: You commuted or what?

THE WITNESS: Yes, sir, I did.

Q During the time that you were at the training academy, were you there on a full-time basis or were you there at certain times when courses were given?

A At certain courses when my course was given.

Q And in between times, where were you?

A I was at the facility.

Q Would you describe your job assignments since you have been a correction sergeant?

A At given times my duty is be chart sergeant on a relief basis, or at one time I was a permanent chart sergeant for the commando shift, and then after that I become relief sergeant for the regular sergeant.

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The chart sergeant, actually he is responsible for running the whole facility on given times. He does the assigning of the officers and he just makes sure that the institution functions.

THE COURT: Let me understand that a little better. I understand what a chart sergeant is. Are you saying you had the chart sergeant job on a regular basis?

THE WITNESS: As relief.

THE COURT: How often? How many days a month, a week or a year?

THE WITNESS: Well, it would average two days a week, possibly, his days off.

Q Were you for part of the time a permanent chart sergeant?

A Yes, sir, for the commando shift for a period of about six months.

Q What is the commando shift?

A This is more or less a relief shift. We refer to it as the commandos. Right now we are 10:45 to 6:45, and on the winter schedule we change to 9:30 to 5:30, and we are the shift that relief the other shifts, the 7:00 to 3:00, the 8:00 to 4:00. We fill in.

Q You say 6:45 --

A 10:45 A.M. to 6:45 P.M.

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Q Have you had any other assignments since you have been a sergeant?

A No.

Q Have you taught at the training academy since you have been a sergeant?

A Yes, I have.

Q What have you taught?

A The same course, transportation of inmates.

Q At the time in 1961 when you first went to Ossining, were there certain jobs to which blacks were not assigned?

A Yes, there were.

Q Would you tell me what those were?

A Well, you have to get an institutional picture of what I am saying. These names I name off might not mean anything to anyone here except people that are familiar with the facility.

There was areas say like the duty office or you had, say, front in the administration building for the visiting desk, front entrance door, the lobby gate or the armory or certain areas. No black, to my knowledge when I went there in '61, was in charge of any shops or work areas. We mostly functioned under the duty as, like I said, the handball court or the ball field, which was outside in all type weather.

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Those other jobs, when they became available, we got to the point where we wouldn't consider applying for it because we knew we wouldn't get it.

Q Were there blacks assigned to work in the deputy superintendent's office?

A Not in 1961, no.

Q Are there blacks assigned permanently to work in the deputy superintendent's office now?

A No, there isn't.

MRS. GORDON: Your Honor, I pose an objection to that line of questioning. Is that supposed to imply -- if the questions are designed to show there is discrimination in the deputy superintendent's office by virtue of the fact that blacks haven't been assigned there, which I don't know to be the fact, I object to the question.

THE COURT: What is the relevancy?

MRS. GREENBERG: The relevance is to demonstrate there are certain jobs which help one prepare to be a sergeant.

THE COURT: What?

MRS. GREENBERG: That help one prepare to be a sergeant from which blacks have been excluded.

THE COURT: I suppose any job would help you be prepared to some extent.

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I will hear it for that limited purpose.

Q Are any of the jobs that you just described as being jobs from which blacks were or are excluded jobs which would give a person help or knowledge that would help him pass the sergeant's examination?

A Yes, I feel they would.

Q In what way or which particular jobs?

A Well, just in the DSO's office alone --

THE COURT: Deputy superintendent's?

THE WITNESS: That is short for deputy superintendent's office.

A There are certain things, papers, documents, that pass through that area that you pick up little bits here, little bits there which would be very beneficial to someone who is going to take a provisional exam.

Q A provisional exam?

A I mean a sergeant's promotional exam. I am sorry.

Q Did you take the 1972 examination for promotion to sergeant?

A Yes, I did.

Q Did you receive a passing score?

A No, I didn't.

THE COURT: Is this '72 you are asking about?

MRS. GREENBERG: Yes.

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Q Did you take the 1970 promotional exam?

A Yes, I did.

Q Did you pass?

A No, I didn't.

Q Did you take the exam before 1970?

A I can't recall, to my knowledge. I think I have taken three, including this last one, and I failed all three of them.

Q How long have you taught transportation of inmates at the training academy?

A I would say between three and three and a half years.

Q In Plaintiffs' Exhibit 19, question 7, it reads:

"A correction officer and you, a supervisor, are in charge of transporting two inmates from one correctional facility to another. While enroute, one inmate complains of severe chest pains and appears to have difficulty in breathing. Of the following, which one would be the best course of action for you to take?"

Now I am going to read you the possible choices of answers and I would like you to comment on them.

"A Stop and try to administer first aid to the inmate.

"B Try to make the inmate comfortable and continue on to your original destination.

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"C Stop at the first available telephone and call for assistance from the local law enforcement agency.

"D Proceed quickly to the nearest correctional facility."

I would like you to tell me which answer you think is the correct answer or whether you think there is a correct answer.

A Well, I would stop and try to administer first aid. The way the question read to me is that the chest pains, he was having trouble breathing. So maybe mouth to mouth resuscitation might help him in some way. To me that would be first aid. I would choose that one.

Q Where are the majority of correctional facilities to which or from which one might be transporting an inmate in New York State?

A I would answer that my own way. It would depend on where you are. Say on the Thruway this occurs.

Q Where are the correctional facilities, most of the correctional facilities, in New York State? Where are they located?

THE COURT: I really don't think you have to ask the witness. I know most of them: Attica, Coxsackie, Auburn, Greenhaven, Ossining.

Q Go on with your -- let me state first Plaintiffs'

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Exhibit 20 indicates the correct answer to the question I asked --

THE COURT: I can't wait to hear.

Q -- is C, "Stop at the first available telephone and call for assistance from the local law enforcement agency."

MRS. GORDON: Your Honor, I would like for the record to interpose an objection to a discussion of which is the correct or good of better answer to any given set of questions. I am fully aware that the answer to any given question enables the court to establish the context in which it is operating. However, in terms of litigation of the examination, the question of which key answer is the appropriate one has a very long and established practice in the state courts. Normally it is required that an expert in that given field come in and testify as to which is the best answer.

THE COURT: Hold it. In two words, what is your objection?

MRS. GORDON: I think consideration of the key answers is inappropriate for this court.

THE COURT: I am not considering any key answers. The question hasn't been asked yet.

Q You have taught transportation of inmates. Are you the only person who teaches transportation of inmates to

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correction officers at the New York State Training Academy?

A I wouldn't say the only one. I would imagine they would have substitutes in the event that when they have me scheduled I couldn't make it for some reason, I was ill or something.

Q Are you the principal instructor?

A I am the principal instructor, yes.

Q What would you teach your class if this question were raised what they should do, what the proper procedure would be?

A I would instruct them to administer first aid the way that the question read.

THE COURT: I will say this. Of course, the subject matter you have been questioning this witness about may be relevant to job relatedness, but it's perfectly clear, and I am assuming, it is not related to the question whether the exam per se discriminates against anybody.

MRS. GREENBERG: The question of discrimination is one that is a statistical question.

THE COURT: Right.

MRS. GREENBERG: The question of job relatedness, once the statistical question is decided, has to do with job relatedness. If the answer is a wrong answer, then obviously the question is not job related.

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Q As best you recall the 1972 examination, are there any aspects of the sergeant's job as you have experienced it for almost a year which were not covered by the examination?

A Yes.

Q Would you please tell me what aspects those are?

A Most of the questions on the exam were more or less like judgment questions like the one you just read off and during the time I was functioning as a provisional sergeant I didn't see where any of those questions could determine whether I would be a good sergeant or a bad sergeant, or if any one.

Q What aspects of the sergeant's job were not covered by the examination?

A The actual functioning, the duties of a sergeant, your daily functions.

Q Do you know people who you regard as good sergeants who failed the examination?

A Yes.

Q When did you hear about this lawsuit?

A It was read -- they called a supervisors meeting at the facility. I don't remember dates. But the letter was read off by the union to us stating that Sergeant Hayes and Sergeant Kirkland had put in an injunction against the

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exam and that was the first time I heard of it.

Q Were you in favor of the suit?

A Yes, I am.

MRS. GREENBERG: No further questions.

THE COURT: Mrs. Gordon.

CROSS EXAMINATION

BY MRS. GORDON:

Q You mentioned that you were chart sergeant or chart officer on the commando shift for a period of time.

A Yes.

Q Are there any other shifts operating at Ossining at the same time as the commando shift?

A Yes.

Q And how many other shifts operate at the same time as the commando shift?

A 7:00 to 3:00, 8:00 to 4:00 and they just created another shift, 2:00 to 10:00.

Q Do you know the names McKinnie and Green?

A Yes, I do.

Q Are they black?

A Yes.

Q Do you know whether or not they have had occasion to work in the superintendent's and deputy superintendent's office?

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A Deputy superintendent's office and duty desk are two separate assignments.

THE COURT: That doesn't answer the question. Have they worked in the deputy superintendent's office?

THE WITNESS: No.

Q Have they worked in the superintendent's office?

A Not to my knowledge.

Q During the course of the daily functions as you mentioned them of a sergeant, your daily functions, do you have to supervise correction officers in the performance of their duties?

A Yes.

Q Do you have to supervise inmates to some extent in the performance of their duties or tasks?

A Yes.

Q Do you have to solve problems as they come up during the course of your daily work, either problems between inmates or problems between officers and inmates?

A Yes.

Q You mentioned that you attended a union meeting. Did you mean a meeting of the Brotherhood of New York State Correction Officers referable to this suit?

A No, I mean the other union, the AFL-CIO, Security, Council 82.

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Q That was a Council 82 meeting where this suit was discussed?

A Right.

Q Do you believe that the transportation of inmates is an important duty assigned to officers and sergeants?

A Yes, I do.

MRS. GORDON: Thank you very much. No further questions.

THE COURT: Thank you, Sergeant.

(Witness excused.)

MR. BALLER: Your Honor, I must apologize for not being in court at the opening of the day. I thought there would be a sentencing and I ran down to research a legal point I thought would come up.

We call Edward Kirkland.

E D W A R D L O U I S K I R K L A N D, a plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BALLER:

THE COURT: You are one of the plaintiffs in this case?

THE WITNESS: Yes, I am.

Q Please state your address.

A 840 Eastern Parkway, Brooklyn, New York 11213.

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For the record, please state your race.

A I am black.

Q What is your age?

A I am 42 years old.

Q Would you summarize your educational background?

A I have had eleventh year of high school.

Q When did you finish that?

A 1945.

THE COURT: Where was it?

THE WITNESS: I went to Murray Hill Vocational High School.

THE COURT: Is that in this area?

THE WITNESS: Yes, the New York area.

Q Have you served in the armed forces?

A Yes, I have.

Q When was that and what did you do?

A I went in the service December 8, 1948, and I came out November of 1952.

THE COURT: What branch were you in?

THE WITNESS: I was in chemical warfare. I started out in the infantry and then I was in chemical warfare.

Q What was your highest rank in the service?

A Staff sergeant.

Q Did you receive an honorable discharge?

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A Yes, I did.

Q By whom are you now employed?

A I am employed by the New York State Department of Correctional Services.

Q How long have you worked for the department?

A I worked for the department eleven years, but I have had 14 years of state service continuously.

Q Where are you now working?

A I am working at the present at the Ossining Correctional Facility at Ossining, New York.

Q What is your rank?

A I am a provisional sergeant.

Q Could you briefly summarize your work history before you came to the department and after you left the service?

A My work history before I came to the department, when I first came out of service I worked for Macy's Department Store. At that particular time I was a clerk, and I worked at a concession at one point. I worked in kid's furniture, that sort of thing.

Q What was your next job after that?

A After that I was a security officer for the New York City Housing Authority.

Q How long did you hold that job?

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A I held that for a period of five years, I believe.

Q And why did you change jobs after that?

A For more pay.

Q Where did you go after the Housing Authority?

A I went to the New York State Department of Mental Hygiene. I worked as a safety officer.

Q Where was that?

A That was at Brooklyn State Hospital.

Q What were your duties in that job?

A I was a safety officer. I was responsible for the protection of grounds, buildings, visiting public that came in the hospital and employees.

Q Do you remember what period that was?

A That was from 1959 to 1962.

Q Did you go to the Department of Correctional Services after that?

A Yes, I did.

Q Is that service at the Brooklyn State Hospital what you are talking about when you refer to your 14 years of continuous service, that plus the Correctional Department service?

A That's correct.

Q While you were at the Brooklyn State Hospital, were you the head of any employees organization?

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A Yes, I was. At one point I was chairman of the Safety Officers Benevolent Association.

Q Was that an elected position?

A Yes, it was.

Q Do you recall the date when you went to work for the Correctional Services Department?

A I went to work at the Correctional Department July 18, 1962.

Q I am going to show you the last two pages of a document marked for identification Plaintiffs' Exhibit 23. Is this the form of application that you filled out at that time?

A Yes, I believe it is.

Q That has your picture on it, does it not?

A Yes, it does.

Q And it indicates your race as Negro?

A Yes.

MR. BALLER: I will be referring to this document several times and I would like to submit it in evidence. It contains material copies at Ossining the same as the one we introduced for Mr. Hayes. Counsel has copies of the same documents.

THE COURT: Any objection, Mrs. Gordon?

MRS. GORDON: I am checking, your Honor. I don't

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think so.

No, your Honor.

(Plaintiffs' Exhibit 23 was received in evidence.)

Q Have you worked at Ossining throughout your service with the Correctional Services Department?

A Yes, I have.

Q How did you come to be hired at Ossining?

A I took a competitive Civil Service examination. After that I was notified through an official notification and I was also notified to prepare to take a physical examination, which I did, and I came on the eligible list and I went for an interview, I believe, and I was hired.

Q And what job were you hired into?

A As a correction officer.

Q How long did you remain a correction officer?

A I remained a correction officer for ten years.

Q When did you become a provisional sergeant?

A In August of 1972.

Q During the ten year period when you were a correctional officer, could you briefly describe some of the duties and job assignments that you had?

A Yes. As others stated before me, I had a variety of jobs in the institution. I started off working in the

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lower yards, in the recreation areas, I worked in the shops. I have had secondary jobs in the administration building, the hospital. I worked in the condemned cells, which is the death house. I worked in the death house, which was supposed to be a selective type thing. They didn't have everybody working there at the time. I have worked in the state shop, the laundry. I worked as frisk officer at the rear door. I worked as officer in charge of the porters. At one point I was the officer in charge of Housing Block 5, and I was also officer in charge of Housing Block B.

I worked in the restricted area which is called HBC at the institution. That covers it.

Q Did you work up on the wall at some point?

A Yes, I have.

Q Did you work in the messhall?

A Yes, I have.

THE COURT: Can you think of any important area that you haven't worked in?

THE WITNESS: Yes, sir, I can think of a few.

Q What are some of the areas that you have not worked in?

A I have never worked in the armory, which is supposed to be a high security type area, yet there are people working in the armory that have less time than I have had.

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I haven't worked in the commissary, which is another responsible position.

I don't think I have ever been in charge of the condemned cells, which at that time was a very important position.

THE COURT: You say you have worked there?

THE WITNESS: Yes, I have worked there. I have worked as an exercise officer, where you took the inmates out and gave them exercise.

THE COURT: That gives me an idea.

Q Have you been rated on your performance as a correction officer?

A Yes, sir, I have.

Q What have your ratings been?

A My ratings have always been satisfactory.

Q Did you ever have an unsatisfactory rating?

A Not to my knowledge, no.

Q Have you ever received any particular commendations or awards for your job performance?

A No, I haven't.

Q Have your superiors ever told you you were doing a good job as a correction officer?

A Yes.

Q Could you tell us when that happened and which

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supervisor was involved?

A Well, I will go to the highest supervisor at the institution, which is the warden.

Q When did he tell you you were doing a good job?

A A number of times that I have met with him and discussed certain --

Q Could you give us an approximate date?

A In the area of 1972 mostly.

Q Would this be before you became a provisional sergeant?

A Yes, sir.

THE COURT: Is that the present warden?

THE WITNESS: Yes, sir, that is Warden Theodore Schubin.

Q Have you ever been criticized for your performance as a correction officer?

A Yes.

Q Could you tell us when that was?

A That was some time --

Q And what happened?

A Sir?

Q When it was and what happened.

A That was some time ago. It dates back as far as 1964. That particular time I was having a particular problem

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with the inmates in the messhall. I worked in the messhall that particular time. My disciplinary actions was rather high.

Q Did you receive a written reprimand?

A No, I didn't receive a written reprimand. I received a verbal caution.

Q And who was that from?

A It was from the deputy superintendent at that time. Kelly, I believe, Deputy Superintendent Kelly.

Q Have you had any trouble since then in terms of your performance of your job?

A Well, I would like to go into -- I would like to state something prior to that.

At this particular time that I had this particular problem, the deputy superintendent felt at that time that I should be removed from the population, and I went to the wall for about three years.

MRS. GORDON: YOur Honor, I don't mean to interrupt the questioning. I do have a potential witness who might comment on the qualifications of these gentlemen. If counsel would like him excluded from the room, I have no objection.

Would you like that?

MR. BALLER: No. It is not necessary. Thank you.

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Q You say you were on the wall after that for several years?

A Yes.

Q When did you come back down from the wall to the population areas?

A There was a disturbance that occurred at the institution. It was around the first of the year, January 1st. It was New Year's Day.

Q What year was that?

A I think it was 1965 or 1966. It was probably 1966. And I was brought down from the wall and I was assigned to Housing Block 5.

Q Have you had any problems or criticism on your job since then?

A No, sir, I haven't, except for a statement that Deputy Ryder made yesterday.

Q We will get to that in a moment. Was that the first you heard of it?

A No, sir, that is not the first I have heard of it.

Q You stated you were appointed a provisional sergeant in August of last year, is that correct?

A Yes, sir.

Q What have your duties been as a provisional sergeant?

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A Well, my main duty, I am responsible for the custody and control of inmates in an area of the prison and I supervise correction officers.

Q What are the areas you have supervised as a sergeant?

A My particular area at the present time is Housing Block 5, the commissary, the chapel and Housing Block B.

Q What is the nature of your supervision as a correction officer? How do you carry on your job?

A Well, in those particular areas I see that the area is properly cleaned; I supervise the count; I see that the officer is performing his duties; and I see that the officer is seeing that the inmates carry out theirs.

Q What were some of your earlier assignments before this present assignment that you described?

A As a sergeant?

Q As a sergeant.

A Well, as of August, when we first made sergeant, it was kind of an up-in-the-air type of situation. We were just assigned on a daily basis to whatever. It's just lately that we have had these particular assignments. In the last six months maybe.

Q What are some of the places you have worked in that particular period when I gather you were shifted around

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a bit?

A I have worked at the deputy superintendent's office --

THE COURT: As a sergeant, you mean?

THE WITNESS: Yes, sir.

A I have handled some of the charts there also. I worked in the various areas in the administration building. I also worked just about all over the place.

Q What kind of charts have you handled?

A I have been responsible for making out charts for my particular shift, which was the commando shift. That was on an occasion where one of the other supervisors that normally handles the shift was off. I have done that.

Q Have you been called in on any special assignments while a sergeant?

A I have been called in on a few occasion when something more or less critical that I thought arised.

Q Can you tell us when those incidents occurred, what happened, very briefly?

A Yes. Very briefly, recently we had a situation where a supposedly hostile lawyer came in and --

Q Who was that?

A Mr. Kunstler. And they felt it was a critical situation and due to the fact he was dealing with a supposedly

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hostile individual as a client, they wanted me to supervise it, and I did.

THE COURT: You supervised his conference with his client?

THE WITNESS: Yes, sir.

Q Have you been involved in any potential riot situation?

A Yes, I have.

Q When was that?

A April of 1972. This was right after the Attica riots. We had a very bad situation in the yard, and I was on the top of that.

Q Can you tell us what happened?

A Yes, sir. It seems that two of the members of the Black Panther Party got stabbed by a white inmate on the handball court and this particular group was chasing the guy through the yard trying to reach him.

Subsequently it got kind of out of control and I suppose the institution went into a riot action pattern, but it left the majority of us out in the yard to kind of control the situation, and we did.

Q Who was in charge of controlling the situation?

A All I know is that at that particular time we just had a few officers out there. We did have a supervisor who

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did come out in the yard at that time. That was Sergeant Sullivan, I believe. Well, he is a lieutenant now.

Q Who were the officers out there?

A The officers were mostly black officers out in the yard.

Q Were you there?

A Yes, I was.

Q Were you and the other officers successful in keeping that situation quiet?

A Yes, we did.

Q Now, you did hear Mr. Ryder testify yesterday about your not being some place where you were supposed to be, according to him, during the time you were a provisional sergeant, did you not?

A Yes.

Q Would you please tell us what happened at that time?

A Well, I think that was blown kind out of proportion for the simple reason that my area was the commissary at the time and I was supposed to be also in charge of the movie.

Now, I was actually in the commissary area, which is right underneath the movie, and when the situation occurred they called the officer in charge of the commissary. He

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just didn't see me in that particular area so he took it for granted I was not there, but I think, according to Mr. Ryder's deposition, he did say that he did find that I was in that particular area.

Q This area where you were down below the movie theater, was this part of your assigned area?

A Yes, sir. It's the commissary area.

Q Is that where you are supposed to be?

A Yes, sir, that's my area.

Q Did Mr. Ryder find that out after he called you up?

A Yes, sir, because I did speak to him, you know. On occasions I always speak to Mr. Ryder. I did clarify where I was and he was satisfied that I was there.

Q Now, have you received any verbal commendation on your job performance as a provisional sergeant from anyone?

A Yes.

Q From whom?

A From the superintendent.

Q Is that Mr. Schubin?

A Yes, it is.

Q When did he indicate that?

A Well, he's indicated that the majority of the times

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that I have met with him, and I have met with him on a few occasions.

Q What has he said?

A He said he thought I was doing a good job recommending certain programs, I think it was.

Q Let me show you this letter labeled Plaintiffs' Exhibit 39 for identification. Do you recognize it?

A Yes, I do.

Q What is it?

A It's a notification from Superintendent Schubin expressing his personal appreciation of me accepting the position of correctional sergeant, and he said he would also wish to advise that "I would recommend you for permanent appointment at this or any other institution if the occasion should arise."

MR. BALLER: I would like to offer that in evidence.

MRS. GORDON: No objection.

(Plaintiffs' Exhibit 39 was received in evidence.)

MR. BALLER: Your Honor, it is similar to other letters that have been received.

Q During the time that you have worked as a correction officer, have you been in contact with permanent correction sergeants?

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A Yes, I have.

Q Do you know what they do?

A Yes.

Q Is there any difference between your assignments as provisional sergeant and their assignments as permanent sergeants?

A No, sir.

Q Have you had occasion to prepare written reports during the time of your service?

A Yes.

Q I would like to show you a letter which is part of Plaintiffs' Exhibit 23, the first page in that packet, addressed to Honorable John D. Deegan.

Is that your signature at the bottom?

A Yes, that's my signature.

Q Did you write that letter?

A Yes, I did.

Q Did you compose it yourself?

A Yes.

Q What is it?

A This was a situation that occurred in this particular area near where I lived at the time and I apprehended two fellows -- two people that had just robbed a lady. They had knocked her down and everything, and I arrested them.

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Q Is that a report of the incident that you are looking at?

A Yes.

Q Have you prepared other incident reports during the time you have been working for the department?

A Yes.

Q As a correction sergeant, are you required to prepare written reports?

A Yes.

Q What kind of written reports are you required to prepare?

A It depends on the situation. If a situation occurs in my particular area, then I should make out a report. Recently we had a meeting with Deputy Superintendent Davis, and this was about three weeks ago, and he stated that he wanted us to start making reports weekly as to what occurs in our area.

Q Was there any weekly report requirement before that?

A Not to my knowledge.

Q Before that you would file a report when something happened?

A Yes.

Q Have you been rated as a correction sergeant?

A Yes, I have.

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Q What was your rating?

A Satisfactory.

Q When did you receive it?

A 1973, I think. I received one, I know.

Q Have you taken any special training courses for the Corrections Department work?

A Yes, sir, I have been to a few schools. I was at the FBI Training School for Firearms Instruction given at Camp Smith.

Q When was that?

A That was 1973.

Q Have you taken any other courses?

A Yes, sir. I went to the instructors course given by the Department of Civil Service. I did qualify to be an instructor. I have a certificate to that effect.

I also went to the advance training school for correction officers, and I received a certificate for that.

Q Was that run by the Corrections Department?

A Yes, sir.

Q Have you undertaken any special projects inside or outside the prison beyond your regular duties?

A Yes, sir.

Q Could you describe them, please?

A Yes, sir. I was personally responsible for at

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least three drug programs in the institution. One was known as the Problem Workshop. The other was known as Sentry, and the other was called A Start.

Q What were these workshops like?

A These were basically drug-related programs. I did get permission from the warden at one point. We talked about it.

Q How did the programs work?

A It was basically an encounter group where they talked about their problems and what they expected to do about them.

Q Who was responsible for setting these groups up?

A The responsibility was really left up to the inmates, and my wife came in occasionally. She started working with the groups.

Q Did somebody mediate between the inmates and the administration of the prison?

A Yes, sir. Between my wife and I we talked with the superintendent on it.

Q Have you undertaken any other special projects that you can recall?

A Yes, sir. I wrote a proposal a few years ago. It wasn't in the form of a proposal. It was really a thought and it developed into a proposal.

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We wanted a halfway house for people coming out of the institution because we felt it was such a high rate of people constantly coming back that we felt there should be something done about it.

Q Has that proposal materialized?

A Yes, it has.

Q Is that the Halfway House that Mr. Hayes described yesterday?

A Yes, sir.

Q I won't ask you to repeat it unless you think there is something Mr. Hayes left out.

A I would say that we did meet with the deputy commissioner of corrections regarding the program, and we also met with Miss Abbey. We did meet with them. They all thought that the program was a good idea.

What we had planned to do was get people coming out of institutions on a work release program because that particular time the facility we had uptown on Bradhurst Avenue needed rehabilitation. So we were trying to get more inmates to come out on this work release program and they would be paid for their services.

Q Have you been associated with the Sickle Cell Anemia Foundation?

A Yes. In 1973 -- 1972, maybe, 1973, we were

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approached -- I was approached by a few inmates from the institution and they wanted to have the Sickle Cell Anemia Foundation come into the institution and they asked for my help, and Mr. Hayes. And what we did, we went to the warden with this situation, and the warden thought it was a good idea and he told us to handle it, and we did.

We got in touch with a Mr. Mack Barnett from the Sickle Cell Anemia Foundation and with our help he brought in a mobile unit and we tested over 550 inmates from the facility.

Incidentally, we found that over 30, I think, had a trait of sickle cell anemia.

Q Do you know how you came to be chosen as a provisional sergeant last year?

A Yes. At that particular time, and I do remember the sergeant that I was working under at that time, his name was Sergeant Sabolik, Sergeant Sabolik came to me. I was the officer in charge of the chapel rec, which is the recreation area. He came to me with a list and he said that the warden had asked him to get ten names and he was asking me whether I would like to be considered. I said yes.

Q Do you know whether anybody else recommended you?

A No, sir, I don't, other than right after that I met with the warden on an occasion that doesn't have to be

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discussed here. He said that he had personally recommended me for the position.

Q When was that?

A That was maybe a week prior to us being appointed in August.

Q Did he say he personally recommended you for provisional sergeant?

A Yes, he said he had personally recommended me for provisional sergeant.

Q When did you first decide to try and become a correction sergeant?

A I had been trying since 1965.

Q What did you do?

A I had taken the examination and subsequently I failed it.

Q How many times did you take the promotion examination?

A I believe I have taken it approximately four times. I took it in 1965, '68, '70 and '72.

Q Have you ever passed?

A No, I haven't.

Q What is the highest score you ever made on the exam?

A I believe the highest score I made, I may be wrong,

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but it was 65.

Q 65 per cent?

A Yes.

THE COURT: What is passing, do you know?

THE WITNESS: It is supposed to be 70, your Honor.

MR. BALLER: It was 70 this last time. We have not been allowed full discovery as to passing exams.

Q Do you recall the examinations prior to the 1972 exam?

A I vaguely recall them. I don't recall them per se.

Q To the extent you recall them, how similar or different were they as compared to the 1972 exam?

A I thought they were quite different. As I can remember, the examinations prior to 1972 were really not related to the job. I think they talked in the areas of real estate, things of that sort.

MRS. GORDON: Your Honor, may I renew my objection as to the matters pertaining to the examination part?

THE COURT: Yes. As I indicated yesterday, I recognize that you have a continuing objection.

Q Did the 1972 examination eliminate some of those types of questions that you have just mentioned?

A Yes.

Q Do you feel the 1972 examination was more job

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related?

A No, sir.

Q Why not?

A Well, personally I think the overall examination was not good at all.

Q Are there certain parts of the examination that -- I am talking now about the most recent one -- that bother you particularly or --

THE COURT: I don't like the word "bother."

Q Are there certain parts of the examination that you felt were particularly non-related to the job that you were doing?

A Yes, sir. I had difficulty in the English grammar and word comprehension, and I did note that some of the questions there were really not job related as we do the job.

Q Let me show you a document received in evidence as Plaintiffs' Exhibit 15.

Is that your computational review of the examination?

A Yes, it is.

Q And the second page of that document, is that a copy of your answer sheet?

A I can't say whether that's mine or not.

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Q Does it have a number up here?

A Yes.

Q Is that your social security number?

A Yes.

Q Do you think this is your examination sheet?

A I really can't be certain whether it is or not.

MR. BALLER: This was produced by the defendants as Mr. Kirkland's examination sheet. The record will reflect if you compare this exhibit to Exhibit 20, the answer key, that Mr. Kirkland got nine out of fifteen wrong on that section of the examination.

THE COURT: Which section?

MR. BALLER: The written. He called it the reading comprehension, I believe. We all understand that that's questions 46 through 60. The designation of the Civil Service Department is preparing written reports. I believe that's correct. I have it in here somewhere. At any rate, I will verify that. If my statement is wrong, I will correct it.

BY MR. BALLER:

Q Where did you take examinations before 1972?

A If I recall, sir, I have always taken examinations in the institution.

Q Did you observe the other people who took the examination there?

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A Yes.

Q Did the other people who served at Ossining take the examination at Ossining?

A Yes.

Q Are most of the black and Hispanic officers in the state correctional system located at Ossining?

A Yes.

Q Were you able to observe in 1965 about how many blacks and Hispanics were taking the sergeant's examination with you at Ossining?

THE COURT: In '65?

MR. BALLER: Yes.

Q In '65 there was so few of blacks and no Hispanics at that particular time.

Q Can you estimate it?

A I would say an estimation of maybe 10 or 15, at the most.

Q In 1968, can you estimate how many blacks and Hispanics took the exam with you?

A Maybe about 25.

Q Was that blacks or Hispanics or both?

A Blacks.

Q Any Hispanics?

A No, sir.

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MR. KANTOR: I couldn't hear the witness' answer.

THE COURT: He said in 1968 25 blacks and no Hispanics.

Q In 1970, can you estimate how many blacks and Hispanics took the exam with you?

A 1970 I would say that we might have had 50 blacks and maybe one Hispanic. No, no Hispanics. Excuse me.

THE COURT: None?

THE WITNESS: No Hispanics.

A That is 1970?

Q Yes.

A One Hispanic.

THE COURT: You said in 1970 there was one Hispanic?

THE WITNESS: Yes. I know his name, too, your Honor.

MR. BALLER: I have now found the notes I prepared on that. I was incorrect. Mr. Kirkland got seven out of fifteen wrong on the written section. It was Mr. Hayes who got nine out of the fifteen wrong on that section. His examination sheet, Plaintiffs' Exhibit 16, will indicate that.

Q Did you make any effort beyond just looking around at the examination to see how many blacks and Hispanics were taking it these past times?

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A Yes.

Q In what connection was that effort?

A Well, as chairman of the Brotherhood, we have always been concerned with blacks and Hispanics being in responsible positions in the department.

Q What is the Brotherhood?

A The Brotherhood is an organization. It's more or less a fraternal organization for blacks and Hispanics.

Q Has the Brotherhood had meetings in the past about the examinations and promotions?

A Yes.

Q Have there been discussions?

A Yes.

Q What was the nature of the discussions?

A Usually it was before or after the examination. The discussions were -- we were just wondering whether we were going to get anyone this time or whether we were going to fail again. That nature.

Q Did you make it your business as president of the Brotherhood to know how many people were trying for promotion?

A Yes.

Q During these years before 1972, can you tell me the names of any blacks or Hispanics you know who passed

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the examination?

A You said "before"?

Q Before 1972.

A We had, I believe, four.

Q Who were they?

A One was Clayton Hill. He is now -- one was Clayton Hill, one was Dave Harris, the other was Clarence Cheatam, and the other one was Ben Thompson.

Q Were all of them promoted?

A Only two.

Q Which ones were not promoted and why not?

A Ben Thompson and Clarence Cheatam. Ben Thompson at that time was discharged from the institution, and Clarence Cheatam refused it because he didn't want to go elsewhere, I understand. That's what I understand.

Q What do you want out of this case for yourself, Mr. Kirkland?

A Most of all, I want to be a sergeant.

Q What do you want out of this case for the black and Hispanic officers you claim to represent?

A I would like to see them in the same position. I think it is most necessary that blacks and Hispanics be represented above the rank of correction officer in all facilities.

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Q Why do you think it is necessary?

A It's so apparent that blacks are so misrepresented and I think that blacks have kept the lid on explosive situations that have occurred in the institutions, and I believe if we had more black supervisors who are the majority in insitutions today that are incarcerated, mostly blacks and Hispanics in the first place, I believe if we had more blacks and Hispanics they could identify with we would have less riots.

Q When you first came to Ossining in 1962, how many correction officers were there altogether?

A I would say, and this is just a guess, that we had approximately -- I don't think it was more than 20. No more.

Q Is that total or black and Hispanic?

A Black, no Hispanic.

Q Any Hispanic officers?

A No.

Q How many white correction officers were there?

A I would imagine that we have over 300.

Q Can you estimate in 1968 about how many black, Hispanic and white correction officers you had at Ossining?

A In 1968, I would imagine we had maybe about 50.

Q Is that black, white or Hispanic?

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THE COURT: Are you trying to explore Mr. Kirkland's mental knowledge?

MR. BALLER: We have been told by the defendants they cannot identify them by race in the past. Mr. Kirkland's personnel file indicates what his race is. The formal answer is that can't be determined from the documents.

THE COURT: In 1968 you said what?

THE WITNESS: I would imagine in 1968 we had -- I imagine we might have had 75.

Q Is that black?

A '68, black and one Hispanic.

Q How many whites?

A Still close to 300, I would imagine.

MR. BALLER: The records do indicate the current breakdown, so I won't go into that with the witness.

THE COURT: They indicate what?

MR. BALLER: They indicate the current blacks, whites and Hispanics.

THE COURT: As long as you have the figures, would you tell me what they are?

MR. BALLER: All right. As of January 1st of this year at Ossining, 354 correction officers, of whom 151 black, 24 Hispanic.

The figures for May are similar but slightly

different. That was Plaintiffs' Exhibit 29.

Plaintiffs' Exhibit 30, giving figures as of May 1st, 365 correction officers, of whom 151 black and 24 Hispanic.

THE COURT: How many blacks there?

MR. BALLER: 151.

THE COURT: The same as in January.

MR. BALLER: Apparently.

BY MR. BALLER:

Q During your service at Ossining over the last eleven years, has there ever been a black or Hispanic correction sergeant on regular status?

A Permanent?

Q Permanent.

A Yes, sir.

Q How many?

A One.

Q Who was he?

THE COURT: Isn't the testimony the same as the other witness' on the point?

MR. BALLER: I think so, your Honor. This is really directed to showing -- the point of this statement is to show Mr. Kirkland's longstanding concern with this problem, his discussions with other black and Hispanic officers about

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it and his attempts to do something so as to qualify him as a class representative.

THE COURT: As to underrepresentation, I think we have been made aware of that by now.

MR. BALLER: Then let me ask Mr. Kirkland questions going directly to his class representation.

BY MR. BALLER:

Q When did you first become concerned about the discrimination you are alleging in this case?

A In April of 1973.

Q Was that after the results of the last examination were published?

A Yes, sir.

Q Did you talk to other people about your concern?

A Yes.

Q What people did you talk to?

A Mostly black and Hispanic correction officers.

THE COURT: How many people would you say you talked to?

THE WITNESS: Well, your Honor, after the examination came out I personally talked to 90 per cent of the people at my institution who failed that examination; and I personally got up a petition and that petition was presented to the union, saying that we were dissatisfied with what

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occurred because everybody supposedly had failed.

THE COURT: By the union you mean the AFL-CIO?

THE WITNESS: Yes, sir.

Q Did you try to investigate the statistics regarding black and Hispanic officers in the system?

A Yes.

Q How did you do that?

A We -- I asked for a document from minority recruitment, and I did receive it.

Q Where is minority recruitment?

A In Albany.

Q Is that part of the Correctional Services Department?

A Yes, it is.

Q Did you share those statistics with other black and Hispanic officers?

A Yes.

Q Did you discuss them with them?

A Yes.

Q Have you discussed this lawsuit with other black and Hispanic officers?

A Yes, sir.

Q Have any of them indicated they are opposed to it and don't wish you to bring it on their behalf?

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A It is rumored that some have but none have came to me and said they oppose us bringing it.

Q Have any of them indicated they were in favor of it?

A Yes, sir.

Q How many?

A Mostly all the failures, I suppose.

Q Before this past year, how long have you been talking to black and Hispanic officers about these same problems?

A I have been talking to blacks about this particular problem since I came into the department, and I started talking to Hispanics after 1968 or 1967.

Q Were there any Hispanics there before that?

A No, sir.

MR. BALLER: No further questions.

CROSS EXAMINATION

BY MR. KANTOR:

Q You have testified on direct that -- I am sorry. If you cannot hear me, Mr. Kirkland, tell me and I will speak louder.

A I can't hear you now.

Q You testified on direct that in the course of your ten to twelve years as a correction officer you have worked

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almost everywhere in the institution and you have told us that, with the exception of very few places you haven't worked.

Could you tell me, sir, how correction officers are selected for positions or how correction officers select positions in which they will work, posts in the institution?

A Well, I am going to have to go back a few years, Mr. Kantor.

Q Suppose we start with the present system.

A The present system. We have a system whereby -- it's on a bid system.

Q Would you explain what that means?

THE COURT: On the basis of seniority?

THE WITNESS: Yes, sir. It's on the basis of seniority.

THE COURT: That is, the most senior person can ask for the post he prefers, is that right?

THE WITNESS: Yes, sir. In other words, what they do, your Honor, is they put up a notification as to the jobs that are available. If I am in that range of seniority and I outbid everyone else, I get it. But if a guy comes up that has a year or month more than me, then he will get it.

THE COURT: I understand.

Q Mr. Kirkland, you stated on direct examination, I believe, that there were some --

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A Mr. Kantor --

THE WITNESS: Your Honor, I would like to say that I have a ruptured eardrum.

THE COURT: Keep your voice up, Mr. Kantor, or come closer.

MR. KANTOR: I shall certainly try, your Honor.

Q You stated, Mr. Kirkland, that there were approximately four or five areas where you haven't worked, the armory, the commissary, the officer in charge of the condemned cells and some others. I believe it was Housing Block C, officer in charge of Housing Block C.

A Yes.

Q Did you ever have an opportunity to bid for those jobs?

A No, sir.

Q Were they ever open for bidding?

A They had already been taken.

THE COURT: In other words, there was always someone senior to you?

THE WITNESS: Yes, sir. Because now I will expound on that a little bit.

THE COURT: Don't expound on it.

Q I believe that you heard Mr. Hayes testify -- I am sorry -- Mr. Holman testify that he did not know of any

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blacks or Hispanics that worked --

THE COURT: I don't think Mr. Holman has testified.

Q I am sorry. Then it was Mr. Kimble. I believe you heard Mr. Kimble testify that he did not know of any blacks or Hispanics that had ever worked in the deputy superintendent's office. Have you know of any?

A That have worked in the deputy superintendent's office?

Q Yes, that got assigned to a post in the depty superintendent's office.

A Yes. The situation that he is talking about, Mr. Kantor, is we have one, two, three, four positions in the deputy superintendent's office. These people are responsible for keeping records on officers, their attendance, that sort of thing.

Now, there are officers who have worked at the deputy superintendent's office in charge of charts. Sergeant McKinnie has worked there, Sergeant Kimble has worked there, I have worked there, and they have had a few officers working at the duty desk, but not in these responsible positions.

Q In other words, these black officers having been doing clerical work?

A Well, if you consider --

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THE COURT: I am not quite clear what the distinction is. They have been working at charts, you say?

THE WITNESS: Yes.

THE COURT: What do the other people do that you say you haven't done?

THE WITNESS: We have about four correction officers, and I can name them, who have worked in the deputy superintendent's office.

THE COURT: There are four positions, is that right?

THE WITNESS: Yes, that blacks have not worked.

THE COURT: What kind of work are those positions?

THE WITNESS: It is clerical work. But I have known blacks, and I can name one, who requested one of the positions and he is not working there now and they have put another white fellow in that position now.

THE COURT: Is the white fellow senior?

THE WITNESS: Not that I know of.

Q Now, in the positions that you did work in, how did you come to learn what was expected of you in each of those positions?

A In the position that I have worked in --

Q As a correction officer.

THE COURT: You mean when he moved from one place to another how did he learn what he was supposed to do?

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MR. KANTOR: That is what I mean, your Honor.

A Most of the time senior officers usually tell the new men exactly what their duties are. You know, like if I go out to a wall post and I am supposed to relieve, I am supposed to get out there at a certain time to be instructed by the officer who normally has that post. That's who usually gives the instructions.

Q If a situation -- did I cut you off, Mr. Kirkland?

A No. I think I cut you off.

THE COURT: I was about to remark that I assume that if nobody instructed you, Mr. Kirkland, you would go ask somebody what your duty was.

THE WITNESS: That's right. That has been the policy for years, your Honor. I can remember being assigned to the wall post and if you relieved that officer just a few minutes late, he wouldn't tell you anything. He wouldn't say, "You are supposed to call in your equipment check," which is very important. You are supposed to call and say, "I have this on the post. My equipment checks," all that sort of thing. If you didn't get there a certain time, he would drop that trap door, he would take the key and leave, and here you are standing up there not knowing what to do.

THE COURT: All right, Mr. Kantor.

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Q If during the course of your shift on a particular post, say, for example, if you were an officer in Housing Block 5 and you had a question as to what you were supposed to do with any given particular situation, would it not be fair to state that you would consult your sergeant?

A Well, not necessarily, because you don't consult sergeants on things every day. In other words, an officer is supposed to use common sense in institutions. In institutions you have to know the concept before we can start dealing with it. You have to know what's going on. Nine times out of ten I don't expect the officers that I supervise to come to me every few minutes or every day and say, "How am I supposed to fill out a count slip?"

The officer that had that position prior would say to him, "Hey, listen, this is how you fill out a count slip."

You know, you only ask sergeants when something very important comes up. You don't keep annoying sergeants about certain trivial things.

Q Who would you ask if you were on a wall post and something came up?

A If something came up while I was on the post?

Q Yes.

A Now, I don't have anyone to ask, right? That means

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I would have to refer to a supervisor.

THE COURT: How would you get in touch with the supervisor?

THE WITNESS: I would call the duty desk, the DSO, which we have a number.

THE COURT: By phone?

THE WITNESS: Yes. I would call the DSO and say I would like to speak to sergeant so and so, and I would ask him. I would say I have disarranged my shotgun and don't know how to fix it back. A lot of officers do that. They play around.

MR. KANTOR: I would like this exhibit marked for identification, please.

xxxx (Defendants' Exhibit V was marked for identification.)

Q You testified on direct examination, I believe, sir, that there comes times when in the course of your duties as a correction sergeant you have to prepare written reports, is that correct, sir?

A Yes, sir.

Q To whom do you usually submit these reports?

A Are you talking about me personally? I would usually submit the report to whoever asked for it.

Q Did you ever take the initiative and submit a report

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without being asked for one?

A If I thought it necessary to submit.

Q Who would you submit those to?

A It depends who I wanted to direct it to. If I wanted to direct it to the lieutenant, I would direct it to the lieutenant. If I wanted to direct it to the deputy superintendent, I would direct it to him. If I wanted to direct it to the warden --

THE COURT: You have no permanent superior?

THE WITNESS: No, sir. Every above the rank of correction officer is my immediate supervisor.

Q I am going to show you now Defendants' Exhibit V for identification. I am going to ask you to leaf through it.

MRS. GORDON: Your Honor, we will move for the admission of these materials in a moment. They are offered as examples of the fact that sergeants write reports, not necessarily for their content in any given situation.

THE COURT: I think you have already established they do write reports.

What is the question, Mr. Kantor?

Q Are those a fair example of the type of reports sergeants are expected to write when asked to by a superior officer or if an occasion arises when they feel a need to

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write a report?

A Well, Mr. Kantor, according to this document here, this is from Greenhaven Correctional Facility --

Q I asked you if those were examples.

A I can't determine that because I don't make out reports like this all the time.

Q Do you ever have occasion to make out reports like that?

A If I thought it necessary. I don't find it necessary that often to make out a report.

THE COURT: I won't accept them on the basis of his testimony. If you want to have a witness come in and tell us something about the reports, I will accept it that way.

MRS. GORDON: Your Honor, we are offering them for the fact that reports are written.

THE COURT: I say there is no dispute about the fact that reports are written, but if you want me to take these as examples, I won't on the basis of this testimony. I don't doubt reports are written. I don't doubt they have to be written in English and I don't doubt they have to understand something about the English language to write reports, if that is the point the state is trying to make by this line of inquiry.

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MRS. GORDON: We just wanted the record to reflect that reports were in fact written, your Honor.

THE COURT: That is agreed and found already by the court.

MRS. GORDON: Fine, your Honor. Thank you.

BY MR. KANTOR:

Q Mr. Kirkland, have you ever in the course of your duties as a correction sergeant had occasion to instruct correction officers in what kind of conduct is expected of them?

A Yes. Do you want me to give you an example, Mr. Kantor? I will give you an example.

Q Please.

A I had an occasion with an officer. I had instructed him to carry out a specific order given him because there was a higher concentration of inmates in one particular area, and I wanted him to seat the inmates in the movie in a particular area, and he gave me some type of negative attitude and I wrote a written report about that. Yes, sir.

Q You did?

A Yes.

THE COURT: Mr. Kantor, I am sorry. I usually take a recess earlier than this. It has been a lopsided morning. Let's take a recess.

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(Recess.)

MR. KANTOR: May I have this exhibit marked for identification Defendants' Exhibit O?

(Defendants' Exhibit O was marked for identification.

CROSS EXAMINATION (CONTINUED)

BY MR. KANTOR:

Q Mr. Kirkland, you said just before we broke that on one occasion you had occasion to counsel, I guess would be a good word, a correction officer as to his duties.

THE COURT: He also wrote a report about his conduct.

A It wasn't too much counseling. I had told him about a particular thing I had wanted him to do and due to the fact that he didn't want to be counseled this is the reason the report was written.

Q I see. Do you have occasion frequently to counsel or instruct correction officers in their duties, their proper course of conduct?

A Yes, sir.

Q On these occasions, do you have occasion to refer to something called an employees rule book?

A Not all the time.

Q On some of these occasions?

A I very seldom had to refer to the rule book as a sergeant so far. I might have, but I can't just remember offhand.

Q I show you a copy of Defendants' Exhibit O and ask if you have ever seen a copy of a book like this before.

A Yes, I have seen this before.

Q Is every correction officer given a copy of that book when he comes into the service, to the best of your knowledge?

A I know of some officers in my institution that don't have a rule book.

THE COURT: I take it in general they do?

THE WITNESS: In general, yes.

THE COURT: They are supposed to have one, but maybe they run out of it?

THE WITNESS: Yes.

Q Are correction officers charged with knowledge of what is contained in this rule book?

A I imagine so.

MR. KANTOR: I offer this in evidence.

MR. BALLER: No objection.

THE COURT: Received.

(Defendants' Exhibit O was received in evidence.)

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Q Now, you testified -- I am sorry. I will walk up so you can hear me.

You testified that you have taken several in-service training courses, have you not?

A Yes.

Q Did you take a course either last year or the year before in management supervision given by the American Management Association?

A No, sir.

Q Have you ever taken a 52-hour course given some time in 1971-1972?

A Did I take a 52-hour?

Q Yes, training course.

A No, I didn't.

Q Were you offered an opportunity to take this course?

A Yes, sir.

Q And you declined to take it?

A No, it wasn't that I declined to take it. I had a specific reason for not taking it.

Q What was the reason?

A It is of a personal nature, Mr. Kantor, but I will answer if you like, if the judge would like me to answer.

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Q I won't pry.

THE WITNESS: Incidentally, your Honor, I submitted my reason to the training lieutenant for the reason I did not.

THE COURT: It is not my question.

THE WITNESS: Oh, yes.

Q I believe you testified on direct examination when counsel asked you as to a number of blacks --

A Could you please, Mr. Kantor, speak up?

Q The number of blacks in Ossining in 1965 and 1968 and 1970. You took the sergeant's examination in 1965, right?

A Yes, sir. I have taken it every time that I was qualified to take it from 19 -- you know, whatever time I was qualified.

Q I understand. Could you tell me, to the best of your knowledge, what portion of the blacks eligible to take the examination in 1965, sergeant's examination in 1965, took it?

A I stated that approximately -- you said 1965?

Q Yes.

A I said approximately 25 -- 20 or so took it.

Q Approximately how many blacks at that time were eligible to take the examination?

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A Well, it must have been 20 eligible if 20 took it.

THE COURT: How would he know how many were eligible?

MR. KANTOR: He knows how many took it.

THE COURT: How would he know how many were eligible? He believes 20 took it. How would he know how many were eligible?

Q Did you not testify on direct you were familiar with the number of blacks and Hispanics in service in 1965 at Ossining?

A I gave you a tentative number. Still I can't establish how many took it. I would say about approximately 20 took it.

Q You said there were approximately 25 eligible, is that correct?

THE COURT: I don't recall any testimony as to how many were eligible.

MR. KANTOR: I will withdraw the question, your Honor.

Q In 1972, the last sergeant's exam, 34944, I believe you stated in your complaint which was filed in this action that approximately 200 black and Hispanic people took the last examination, is that correct, sir?

A It was an approximate figure because there are

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other correction officers working at other institutions. So in an approximate figure, this is what we came out with.

Q What did you base that approximation on?

A It was only an approximation.

Q Did you not say in your deposition that it was based upon your estimation of the number of blacks eligible to take the 1972 sergeant's examination?

A We showed you at the deposition, I believe, a roster of correction officers that could have been eligible to take it, and I think I also stated that there were other blacks at other institutions and there were also blacks who came into the department from narcotics correction who were eligible to take it also. That's where the estimation came from.

Q You estimated that 200 took the examination. That was based upon your estimate of the number of black and Hispanics eligible by reason of fulfilling the seniority requirements to take the examination?

THE COURT: Do you understand the question?

THE WITNESS: No, sir, I don't understand the question.

Q I asked you, Mr. Kirkland, whether or not when you said that there were 200 blacks who took the examination --

A Approximately.

Q -- 34944, approximately, was that figure based on your estimation of the total number of blacks eligible by reason of fulfilling the minimum service qualifications to take the exam?

A Yes.

THE COURT: In other words, did you decide 200 took it because 250 may have been eligible to take it and 80 or 85 per cent of the eligible had taken it?

THE WITNESS: Yes.

THE COURT: The answer is yes.

Q Would you say, then, Mr. Kirkland, that there were more blacks in the Department of Correctional Services as correction officers in 1972 than there were in 1965?

THE COURT: Isn't that certain?

MR. KANTOR: I withdraw that question.

Q Would you say that there were more blacks eligible to take examination 34944 in 1972 than there were blacks eligible to take a sergeant's exam in 1970 or 1968?

A I would imagine so. We had more blacks in the department that particular time in 1972 than ever before.

MR. KANTOR: Would you mark this for identification as Defendants' Exhibit BB?

(Defendants' Exhibit BB was marked for identification.)

xx

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Q Mr. Kirkland, I show you now Defendants' Exhibit BB for identification and ask you if that is your signature on the bottom of the letter.

A Yes, sir, that's my signature.

Q Did you write that letter, Mr. Kirkland?

A I sure did.

THE COURT: Who is it to?

THE WITNESS: It is addressed to -- let me just read this.

THE COURT: Just for my notes, who is it adressed to?

THE WITNESS: It is addressed to Mrs. Ersa Poston, Commissioner, New York State Department of Civil Service, State Campus, Albany, New York.

Q It is dated --

A It is dated March 26, 1973.

Q And you wrote that letter yourself?

A Let me read it.

Q O.K.

(Pause.)

A Yes, sir.

MR. KANTOR: Your Honor, I offer this in evidence as Defendants' Exhibit BB.

MR. BALLER: No objection.

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THE COURT: Received without objection.

xxx (Defendants' Exhibit BB was received in evidence.)

THE COURT: I would like to read it.

(Pause.)

THE COURT: May I ask what you believe that establishes?

MR. KANTOR: Your Honor, we feel that this letter establishes -- we are not using it, obviously, for its content but more for the style in which it is or is not written as a demonstration of Mr. Kirkland's writing ability.

BY MR. KANTOR:

Q Mr. Kirkland, you testified on direct examination --

THE COURT: Do you have any examples of Mr. Ryder's letters?

MR. KANTOR: Undoubtedly we can supply the court with some.

THE COURT: In Defendants' Exhibit M is a memorandum from him on a recommendation. There are other memoranda from other officers.

Q Mr. Kirkland, you said on direct examination -- correct me if I am wrong -- that you took an instructor's course given by the Department of Civil Service and was certified as an instructor, is that correct?

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A Yes.

Q Will you tell me what you are certified as an instructor of?

A To give any course that the instructor at the institution deems necessary. If he thought that he wanted a course taught in firearms instructions, then I would be qualified to teach it. It is just a matter of making up a lesson plan and following through on it. It is to teach you how to make up a lesson plan. That's all that was. You didn't have to be proficient in anything, really.

Q I see. Weren't you a firearms instructor before?

A Was I a firearms instructor?

Q Did you have occasion to instruct in firearms before you took this course?

A No, sir.

Q I am sorry.

A I was selected to go to Camp Smith, the course that the FBI gave, I was selected for that and I received a certificate in that.

Q And that was in firearms?

A Yes, because I am very good at firearms.

Q Did there come a time when you received a notification that you would be reverted to your position, permanent position, as a correction officer?

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A Reverted back to correction officer?

Q Yes.

A Yes, sir.

Q When was that?

A That was dated on and about April 12.

Q April 12th?

A Yes, sir.

Q Are you sure?

A Yes, sir. The notification was dated April 4th but we received it April 12th.

Q You did?

A Yes, sir, or April 11th, something like that.

MR. KANTOR: Your Honor, would you bear with me for one moment?

(Pause.)

Q Mr. Kirkland, are you familiar with the complaint filed in this action?

A Yes, I am.

Q Do you remember when it was filed? I will withdraw that question.

Did you read and sign the complaint in this action?

A Yes.

Q Do you remember when you did that?

MR. BALLER: I think the complaint itself will

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indicate that?

THE COURT: I don't know whether the complaint is dated, but there is the date it was filed.

Is it verified?

MR. KANTOR: Yes.

Q Was it verified on April 10, 1973?

THE COURT: He doesn't remember. Show him the paper.

Q The date isn't recognizable here. I can recognize April, 1973.

THE COURT: Can't counsel stipulate the date?

MR. BALLER: I don't even remember the date.

THE COURT: Can you stipulate he probably signed it the date it was verified?

MR. BALLER: He signed it whatever date it was filed.

MRS. GREENBERG: April 10th.

THE COURT: I don't know the purpose of all this.

MR. BALLER: April 10th.

THE COURT: What are you trying to establish?

MR. KANTOR: I am trying to establish he knew he was being reverted to a correction officer before April 12, 1973.

THE COURT: Let's not have a lot of bumbling.

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Proceed and see if you can find out when he signed it. I understood him to testify that he received the notification around April 11th. So if this was verified April 10th, it would seem to me he has answered your question, perhaps not to your satisfaction, but he has answered it.

Q Is it not in fact true --

THE COURT: Is it the state's claim if he knew that for some reason or other he is not entitled to bring the suit?

MR. KANTOR: I am trying to establish something else, your Honor. I am using this as a vehicle.

Q Did you not in fact receive the notification that you were going to revert to your permanent position as correction officer on April 4, 1973?

A Mr. Kantor, I am going to be truthful with you. I am making a sworn oath. That document was dated April 4th but we did not receive it, and that can be verified from the other people that received the same notification that I did. It was dated on that particular date but we did not receive it that date. That's what we were wondering about.

THE COURT: How was it transmitted?

THE WITNESS: It was transmitted to us through the superintendent. In other words, the superintendent -- we

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received it in our mail box.

THE COURT: It wasn't transmitted through the United States mail?

THE WITNESS: No, sir. It was from the institution. That's how we received it. And that particular date we received it, we was confused. We said, "Why didn't I get this way before if it was dated this date?"

THE COURT: I understand.

THE WITNESS: We couldn't understand that, how it was dated one date and we got it, you know, a couple of days later.

Q It was dated April 4th?

A I didn't get it on April 4th.

Q That's O.K. I show you now Plaintiffs' Exhibit 39 and ask you what date that is dated..

A That is dated April 6, but I am saying it can be verified.--

Q I am sure it can.

A -- by others that we didn't receive it April 6th.

THE COURT: Unless it is in evidence already --

MR. KANTOR: This is in evidence already.

THE COURT: May I see it?

MR. KANTOR: Yes, your Honor.

(Document handed to court.)

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THE COURT: Did you receive Plaintiffs' Exhibit 39 before or after you were notified that you would be reverted? This is the letter fro the superintended to you.

THEWITNESS: Sir, that date that is dated on top, we received that afterwards. In other words, I received the notification way after this date, and that's what we were wondering about.

THE COURT: Let me get it straight. Do you want to listen to this, Mr. Kantor?

MR. KANTOR: Yes.

THE COURT: Mrs. Gordon, please be seated.

I have in my hand Exhibit 39, which is a letter from Superintendent Schubin to you dated April 6, 1973. Am I correct you stated you received this before you received the communication advising you that you were reverting to correction officer or did you receive it after?

THE WITNESS: I received it attached with that notice.

THE COURT: I see. You received the notice --

THE WITNESS: Yes, sir, that notice there attached to that.

THE COURT: The two documents were received together?

THE WITNESS: Yes, sir.

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MR. BALLER: I don't want to interrupt and speak out of turn, but I can simplify things. This morning I detached that letter from this document. Perhaps we should put this in evidence as Plaintiffs' Exhibit 39 or 40. It is the notification of reversion. I am responsible for it being detached. I just didn't think this was relevant.

THE COURT: I don't know whether it is either, but let's have it all in its original condition.

Miss Clerk, staple them again.

So as I understand it now, on April 10th or 11th you received these two documents stapled together, one which was dated April 4th and one which was dated April 6th?

THE WITNESS: And that I swear.

THE COURT: I know you do.

BY MR. KANTOR:

Q Mr. Kirkland, did you attend approximately a week after the examination, give or take a few days, a candidates' review wherein you were given a copy of the questions on examination 34944 and a copy of the proposed answer key?

A Yes, I did.

Q And did you file any objections?

A Yes, I did.

THE COURT: Objections to what, Mr. Kantor?

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MR. KANTOR: To the proposed answer key.

THE WITNESS: Not to all.

THE COURT: Is there some particular procedure for that purpose?

MR. KANTOR: Yes, your Honor.

THE COURT: I am not acquainted with it.

MR. KANTOR: We would prefer to establish that procedure through our own Civil Service experts.

THE COURT: All right. Did you know there was some way by which you could object to the proposed answers?

THE WITNESS: Your Honor --

THE COURT: Just answer that. Did you know that there was?

THE WITNESS: Yes.

Q Mr. Kirkland, I want to show you --

MR. KANTOR: Bear with me. I have to mark these for identification.

Please mark these as Defendants' Exhibit X for identification.

THE COURT: You had better staple them all together or clip them together.

xxx (Defendants' Exhibit X was marked for identification.)

Q Mr. Kirkland --

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THE COURT: Is this more on the same subject of the answers?

MR. KANTOR: Yes, this is in regard to the objections.

THE COURT: Could you make a representation to me as to what you understand the procedure to be so I have some understanding of all this when I am listening to the testimony?

MR. KANTOR: Your Honor, there is a review of the examination --

THE COURT: After the examination?

MR. KANTOR: After the examination.

-- where candidates for promotion are given an opportunity to review the proposed answer key.--that means the proposed answers--and file objections to any of the answers, saying that there are other of the choices which are either equal to or better than the selected answer.

THE COURT: All right, thank you.

Q Mr. Kirkland, do you recall how many objections you filed?

THE COURT: Do you do that in writing?

MR. KANTOR: Yes, sir.

THE COURT: Did you file objections?

THE WITNESS: Your Honor, how that was done --

The [illegible] He is asking if you remember how many objections yo[illegible]ed.

THE WITNESS: Yes, sir.

THE COURT: About.

THE WITNESS: Yes, sir.

Q How many was that?

A I think approximately nine.

Q I show you now Defendants' Exhibit X for identification. You will note on the exhibit that there is a cover sheet and underneath there is an objection form. I am going to ask you only to look at the objection forms for each of these and ask you if those were the ones you filled out.

MR. KANTOR: I apologize to the court. I left one of the objections off.

I ask to put that with the objections. I will have it stapled as soon as Mr. Kirkland is finished.

THE COURT: The question is whether those appear to be the objections that you filed, Mr. Kirkland.

A Yes, sir, that seems to be correct.

MR. KANTOR: I offer these in evidence.

MR. BALLER: No objection.

THE COURT: Received.

(Defendants' Exhibit X was received in evidence.)

xxx

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MR. KANTOR: Would you mark this as Defendants' Exhibit Y for identification?

(Defendants' Exhibit Y was marked for identification.)

Q At some point in early May of this year did you attend a computational review wherein you were given a copy of what was your answer sheet and the final key answers, an opportunity to check to make sure that the examination was properly graded?

A Yes, sir.

Q Were you required to fill out a declaration concerning the computational review?

A Yes, sir.

Q I show you now Defendants' Exhibit Y for identification and ask if you have seen that before.

THE COURT: What is the relevance of that?

MR. KANTOR: Your Honor, we are trying to establish the methods, the appeal methods, to determine the reliability of a Civil Service examination.

THE COURT: I don't see why a man would have a right to find out whether or not he was properly graded and it would show whether or not it was job related or it was validly constructed or it was discriminatory in any way. The complaint here is not that it wasn't graded. The

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complaint here is that although it was properly graded it deprived the defendant of his constitutional right, which may or may not be proven. The fact it was properly graded doesn't seem to me to be relevant.

MR. KANTOR: Your Honor, there is an issue in the complaint which is couched in rather vague terms saying that methods by which the examination was graded, constructed and administered lent themselves to discriminatory practices. We are trying to establish the practices.

THE COURT: To the extent that that allegation can be construed to mean what I have just been talking about it does not allege a cause of action against the state. I don't understand the plaintiffs to be asserting there was anything dishonest about the procedure or anything of that kind.

Is that correct?

MR. BALLER: That is correct, as we have narrowed the allegations in the pretrial order.

I might also point out these documents are already in evidence as Plaintiffs' 15 and 16.

MR. KANTOR: Then I will withdraw the offer.

THE COURT: I would expect they are the same as Plaintiffs' Exhibit 15.

Q Mr. Kirkland, you testified on direct examination

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that you were recommended by Superintendent Schubin for the position of provisional correction sergeant. Before you talked to Superintendent Schubin were you approached by anyone else with regard to your willingness to be a provisional correction sergeant?

A Yes, I said that before and I stated the sergeant's name.

Q What was his name?

A Sergeant Sabolik.

Q Do you know of anybody else who recommended you to this position?

A I think I answered that also, sir, and I said I don't recall whether anyone else recommended me except the superintendent stated that he did recommend me.

THE COURT: The superintendent stated that he recommended you?

THE WITNESS: Yes, sir, he sure did.

THE COURT: Doesn't he actually make the appointment?

MR. KANTOR: That is my understanding, your Honor.

MRS. GORDON: Your Honor, if I could explain, apparently there are several levels of recommendation involved here. Those are made to Superintendent Schubin. Then Superintendent Schubin makes some recommendations to

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Albany, in other words, the central office, and I think technically the central office makes the appointment.

MR. KANTOR: I have no further questions.

THE COURT: Do you have any further questions, Mr. Baller?

MR. BALLER: One brief question.

REDIRECT EXAMINATION

BY MR. BALLER:

Q Mr. Kirkland, the letter marked Defendants' Exhibit BB which is in evidence, your letter to Ersa Poston I believe regarding the examination, was that the letter that you referred to in your direct testimony as the petition?

A Yes, sir.

Q Did you send any other materials to Ersa Poston along with the letter or was that your petition?

A That was my petition where I stated that 90 per cent of the people at the institution, black and white, failed the examination, and I also submitted that petition to the union.

Q Had that been discussed with union members?

A Yes, because we are all union members.

MR. BALLER: No further questions.

MR. KANTOR: No recross, your Honor.

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THE COURT: Thank you very much.

(Witness excused.)

MRS. GREENBERG: Plaintiffs will call James Holman.

J A M E S H O L M A N, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

THE COURT: Be seated, Mr. Holman, and keep your voice up so we can all hear what you have to say.

DIRECT EXAMINATION

BY MRS. GREENBERG:

Q Please state your address, Mr. Holman.

A 1500 Noble Avenue, the Bronx.

Q What is your race?

A Negroe.

Q What is your age?

A Forty-three.

Q By whom are you presently employed?

A New York State Department of Correction.

Q In what position?

A Acting sergeant.

Q When were you appointed an acting or provisional sergeant?

A August, last year, '72.

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Q When were you first employed by the Department of Correctional Services?

A May, 1969.

Q I would like to show you Plaintiffs' Exhibit Number 21, which has been marked for identification. The second page, which is entitled personal data sheet for employees, did you fill that out?

THE COURT: The one with the picture?

MRS. GREENBERG: Yes.

THE COURT: You mean did he actually type it or did he give the information?

Q Did you give the information?

A Yes, I did.

Q Is this your picture?

THE COURT: It's a little hard to tell.

MRS. GREENBERG: I would like the court to note that this is dated May 15, 1969, and there is a designation at item 11 of color, Negroe.

THE COURT: I am trying to see. All right.

MRS. GREENBERG: I would like to offer Plaintiffs' Exhibit 21 into evidence.

MRS. GORDON: No objection.

THE COURT: I have no objection to receiving it, but for what purpose, to establish what?

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MRS. GREENBERG: To establish the records on race which the state has kept as late as 1969.

(Plaintiffs' Exhibit 21 was received in evidence.)

Q How much education have you had, Mr. Holman, formal education?

A I completed the normal small department.

Q I am sorry. I can't hear you.

A I completed junior high, elementary, and I have an equivalency diploma from high school.

Q Were you in the military service?

A Five years military service.

Q When you were finally discharged, at what rank were you discharged?

A Sergeant.

Q Where were you employed before you became a correction officer?

A New York State Department of Mental Hygiene, safety officer.

Q During what years?

A 1954 to 1961.

Q What were your duties?

A Safety officer.

THE COURT: Does the Corrections Department pay

better? I notice so many of you transferred from Mental Hygiene to Corrections.

THE WITNESS: Yes, they do.

Q Would you describe the assignments that you have had as a correction officer from 1969 until August, 1972?

A Starting off, I had various amounts of assignments consisting of either relief, block relief or wall relief, until two years ago I got permanently assigned to be in charge of one of the blocks.

Q What evaluations have you received?

A All satisfactory.

Q Would you describe your duties as a correction sergeant?

A Well, presently as a correction sergeant I am a supervisor in charge of a shift, making assignments to the men coming in, making up reports, doing other related duties in a supervisory capacity.

Q Have you had the same kinds of duties that other correction sergeants have?

A Yes.

Q Have you received any evaluations of your work as a correction sergeant?

A Just the last one I received as a sergeant. It covers me from May, '72, to December -- May, '72, to

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December, '73. Satisfactory.

Q Did you take the 1972 examination?

A Yes, I did.

Q Did you pass?

A No.

Q You first were employed by the Department of Corrections in 1969. Were you eligible to take the 1970 examination for correction sergeant?

A No, I wasn't.

MRS. GREENBERG: I would like to have marked for identification Plaintiffs' Exhibit 40.

(Plaintiffs' Exhibit 40 was received in evidence.)

THE COURT: In my last trial that was a sawed-off shotgun.

Q Would you please tell me what this is?

A This is a letter from the superintendent stating--expressing his personal appreciation for myself in helping him in his dire need as a supervisor.

Q What is the date of the letter?

A April 6, 1973.

MRS. GREENBERG: I would like to offer this letter into evidence as Plaintiffs' Exhibit 40.

THE COURT: I take it there is no objection since

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it is the same letter.

MRS. GORDON: There is no objection. I want to see it for a moment.

xxx (Plaintiffs' Exhibit 40 was received in evidence.)

THE COURT: For the watermark?

MRS. GORDON: No, sir, I don't want to see the watermark. Off the record. I want to see if it says "dire."

Thank you, your Honor.

MRS. GREENBERG: The word was "critical."

I have no further questions.

MRS. GORDON: Mrs. Greenberg, for convenience, can we have that letter marked in evidence with the provisional notification or the reversion notice such as we did with the last witness?

MRS. GREENBERG: Mr. Holman, do you have the letter or notice to which --

THE COURT: Why don't we just state for the record that it was originally affixed to a similar notice such as Mr. Kirkland's?

MRS. GORDON: I don't have any questions.

THE COURT: Very good. We will go to lunch early. It is within five minutes of the regular time, so let's break at this time and return at 2:00 o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

2:05 P.M.

THE COURT: Mrs. Greenberg.

MRS. GREENBERG: Plaintiffs call Cecil O'Neil.

C E C I L O ' N E I L, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

THE COURT: Please be seated, Mr. O'Neil.

DIRECT EXAMINATION

BY MRS. GREENBERG:

Q Mr. O'Neil, would you please state your address?

A 2641 Marion Avenue, Bronx, New York.

Q Would you state your race?

A Black.

Q By whom are you presently employed?

A New York State Department of Correctional Services.

Q In what position?

A Correction officer.

Q When were you first appointed a correction officer?

A August 20, 1970.

Q Where do you serve?

A Ossining Correctional Facility.

Q Did you take examination 34944?

A Yes.

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Q What score did you receive?

A 65.

Q What was the passing score?

A 70.

MRS. GREENBERG: I would like to have marked for identification Defendants' Exhibit Z-1.

THE COURT: I don't understand.

MRS. GREENBERG: It can be either.

THE COURT: All right. It is unusual in my experience. If the parties agree to it, all right.

MRS. GORDON: The problem arises because of the telescoping of this case and the order of proof. Therefore I don't object.

xxx (Defendants' Exhibit Z-1 was marked for identification.)

Q I would like to show you Defendants' Exhibit Z-1 which consists of two pages. Would you please tell me if you have seen it before?

A Yes.

Q Have you seen both pages?

A Just one that I remember.

Q Which page have you seen?

A The one with my signature on it.

Q Is that your signature?

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A Yes.

Q Have you seen the first page before?

A I don't remember. I don't think so, no.

Q Who gave you this page, which is a page of signatures?

A Also at the job.

Q What was his name?

A Officer C. Smith.

THE COURT: Was he a correction officer?

THE WITNESS: Yes, correction officer.

Q Did he say anything when he gave you this list before you signed it?

MRS. GORDON: Your Honor, excuse me. I can understand that the plaintiffs don't want to offer this document in evidence, although I certainly would have no objection to putting it in evidence, subject to whatever plaintiffs want to establish about it, but could we just establish what document it is that counsel is referring to when she says "Did you sign this list" or "See this page"?

THE COURT: Can you describe what that page is that you have seen before?

THE WITNESS: Well, my signature is on it.

THE COURT: So I see. But what is it, as far as you know?

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THE WITNESS: From the way I understood it to be, it is a protest about the examination.

THE COURT: A list of people, of signatures of people who were signing a protest?

THE WITNESS: Yes, of the examination.

THE COURT: O.K.

Q Did you know about the lawsuit when you signed this list?

A Yes.

Q Were you in favor of the lawsuit at the time you signed the list?

A Definitely.

Q Are you still in favor of it?

A Yes, very much.

MRS. GREENBERG: No more questions.

CROSS EXAMINATION

BY MRS. GORDON:

Q Officer O'Neil, just so that I may be clear, you identified your signature on the second page of this two-page document, Defendants' Exhibit Z-1 for identification?

A Yes.

Q What was the occasion for your signing your name on this page, the signature page you identified?

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A Protesting the examination. This was a petition.

Q Oh, this petition was presented to you -- I am sorry.

When you were signing this page you thought you were protesting the examination?

A Yes.

Q And who told you that?

A The way I understood it, C. Smith, Officer C. Smith.

Q Now, you have read the first page, is that correct?

A I didn't read it. I glanced at it.

Q I am sorry.

(Document handed to witness.)

THE COURT: Now he has read it.

Q Now, that face page, is that a statement in favor of this lawsuit or against this lawsuit, in your opinion?

THE COURT: It speaks for itself.

MRS. GORDON: It is not in evidence. I would be glad to put it in evidence.

THE COURT: You are going to, I assume.

MRS. GORDON: May I move it in evidence? Is there any objection to that?

MRS. GREENBERG: Yes, there is.

THE COURT: You have a right to put it in evidence

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at this time on cross examination.

Do you object to the exhibit as an exhibit?

MRS. GREENBERG: Yes, we object.

THE COURT: What is the state's purpose in putting it into evidence? What are you attempting to prove?

MRS. GORDON: I think this would be a good point to clarify our purpose with respect to the documents.

The attorneys for the Department of Correctional Services and the Department of Civil Service received these two documents, which one is Defendants' Exhibit Z for identification and there is a second portion to that exhibit.

Perhaps you would mark it for identification at this time.

THE COURT: As what?

MRS. GORDON: Defendants' Exhibit Z-2 for identification.

xxx (Defendants' Exhibit Z-2 was marked for identification.)

MRS. GORDON: The state's attorneys did not collect these documents --

THE COURT: Hold it. I am asking you what you are attempting to prove by it.

MRS. GORDON: It was our purpose in submitting these documents to the court to show there was not a unity

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of interest among the alleged members of the class. That was our purpose in seeking to introduce these documents.

THE COURT: Whether it proves it or not is another matter.

MRS. GORDON: Absolutely.

THE COURT: I will accept it for that purpose.

MRS. GORDON: Could we have it in evidence for that purpose?

MR. BALLER: Your Honor, I think the document has not been authenticated except by Mrs. Gordon's statement. Our questions are directed toward the document which has been filed in the record as part of an affidavit. They are not directed towards it as an exhibit. As far as we are concerned, no one has explained exactly what it is.

THE COURT: That is correct and I can't accept an attorney's statement for that purpose. Let me ask Mr. O'Neil.

Mr. O'Neil, when you signed your name on the second page here, was the first page attached to it?

THE WITNESS: No.

THE COURT: Then I can't accept it at this time.

MRS. GORDON: I was trying to elicit from the witness what his understanding was when he signed the second page of that exhibit, your Honor, and whether he had seen

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Z-2.

THE COURT: I will allow you to continue questioning, but I will have to strike the admission of Exhibit Z-1 at this time.

BY MRS. GORDON:

Q I just want to get clear, Mr. O'Neil, what was your understanding when you were signing page 2 of Defendants' Exhibit Z-1 for identification?

A It was a petition protesting the examination.

Q You thought you were supporting this lawsuit, is that correct?

A Yes, yes.

Q I show you Defendants' Exhibit Z-2 for identification, which is two pages, and ask you at the time --

THE COURT: Ask him if he has seen it, first.

MRS. GORDON: That is all I want to establish, your Honor.

THE COURT: Have you ever seen that?

THE WITNESS: Is it the same copy?

Q Mr. O'Neil, why don't you look at page 1 and look at page 2. Maybe I had better take the staple off.

THE COURT: No.

Q I want to know if you have seen that document before today.

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THE COURT: Either page.

Q Either page.

A No, other than this copy here, the same thing there.

Q You mean page 1 of Z-2 is the same as page 1 of Z-1?

A Yes.

THE COURT: Have you ever seen the second page before?

THE WITNESS: No.

THE COURT: And you have never seen the second page until this afternoon, right?

THE WITNESS: Yes.

MRS. GORDON: Thank you, your Honor.

THE COURT: Any other questions of Mr. O'Neil?

MRS. GREENBERG: No.

(Witness excused.)

MRS. GREENBERG: Plaintiffs call as their next witness Henry Liburd.

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H E N R Y L I B U R D, called as a witness by plaintiffs, being first duly sworn, testified as follows:

THE COURT: Be seated, Mr. Liburd.

DIRECT EXAMINATION

BY MRS. GREENBERG:

Q Your address, please?

A Post Office Box 54, Gardiner, New York.

Q And your race?

A Black.

Q How old are you?

A Thirty-eight.

Q What is your present employment?

A Correction officer for the New York State Department of Correctional Services.

Q In what facility?

A Wallkill Correctional Facility.

THE COURT: Wallkill?

THE WITNESS: Yes.

Q When were you appointed a correction officer?

A January 19, 1961.

Q Did you graduate from high school, Mr. Liburd?

A Yes, I did.

Q Where?

A New York School of Printing in Manhattan, New York.

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Q Did you attend college?

A Yes, some courses.

Q Where did you attend college and when?

A Paine College, Augusta, Georgia, in 1956 to '58.

THE COURT: Paine?

THE WITNESS: Paine, P-a-i-n-e.

Q What courses did you take?

A English, math, history.

Q Were you a full-time student?

A No, I was in the service at the time.

I also attended Brooklyn College for one semester. I took six credits there and then from there, when I moved upstate, I took twelve credits at Orange County Community College.

Q What were those credits in?

A Criminology and penology.

Q In what years?

A '63 to about '67, approximately.

THE COURT: That is criminology and what?

THE WITNESS: Penology.

Q Were you in the military service?

A Yes, I was.

Q In what branch?

A United States Army Signal Corps.

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Q What was your rank upon discharge?

A Sergeant.

Q What were your duties in the Signal Corps?

A I was an instructor for pole line construction and telephone installation. I taught ROTC cadets.

Q Where were you first assigned when you became a correction officer in 1961?

A Ossining Correctional Facility, which was Sing Sing Prison at the time.

Q How long were you there?

A Until '63, October.

Q What job assignments did you have at Ossining or at Sing Sing?

A I worked every job in the facility except approximately three jobs: the warden's grounds, officers' mess and the deputy superintendent's office.

Q Were you transferred directly from Ossining to Wallkill?

A Yes, I was.

Q At what time?

A In October.

Q October, 1963?

A '63, yes.

THE COURT: Been there since?

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THE WITNESS: Yes, I have.

Q How many black officers were at Wallkill when you first went there?

A None.

Q Were you the first black officer, to your knowledge?

A Yes.

Q How many black officers are at Wallkill now?

A Two.

Q When did the other one who is there now start?

A October, last year.

Q Were there any black officers at Wallkill in between, that is, who might have come after you got there but left before now?

A Yes. One went on medical leave.

Q Did he ever come back?

A No.

THE COURT: In other words, there has only been one other black person who was an officer at Wallkill besides yourself and your present colleague, is that correct?

THE WITNESS: Right.

Q About how many officers, that is, at the correction officer rank, are there at Wallkill?

A 103.

Q When you first went to Wallkill, were there any

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Hispanic officers of any rank?

A No.

Q When did the first Hispanic -- are there Hispanic correction officers at Wallkill now?

A Yes, five.

Q When did the first Hispanic officer come to Wallkill?

A Right after the first training session at Beacon Training Academy.

Q When was that?

A I'd have to look it up. Approximately three years ago, two or three years ago.

THE COURT: Was this after Attica, do you remember?

THE WITNESS: Yes, definitely.

Q Have there ever been any blacks or Hispanics at Wallkill above the rank of correction officer?

A Definitely no.

Q What assignments have you had at Wallkill as a correction officer? Start with when you first went there.

A When I first went to Wallkill I was placed on the night shift after four hours training during the day, the midnight to 8:00 shift, which they call the first shift, and I worked basically gallery work, because Wallkill is an open door policy institution, medium, minimum institu-

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tion. So you have to tour the various galleries and what have you at night, patrol.

Q What hours?

A Midnight to 8:00.

Q You said after four hours training. Is that the customary amount of training one gets for that job?

A No.

Q Have other officers received more training?

A Definitely yes.

Q What kind of training do most of the white officers who are assigned to night gallery duty -- other white officers who have been assigned to night gallery duty get?

A Yes.

Q What kind of training did they get first?

MRS. GORDON: Your Honor, is this question intended to draw an implication that we train black officers differently from white officers at Wallkill?

MRS. GREENBERG: Yes.

MRS. GORDON: I except to that, your Honor. It is not germane to this proceeding and certainly is beyond the scope of what the defendants are prepared to come forward and show.

MRS. GREENBERG: I am asking these questions for two reasons: First of all, to establish the kind of

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atmosphere prevails at Wallkill with respect to black officers, to explain why Mr. Liburd has not received a provisional appointment as a sergeant; and, secondly, to establish blacks have not received the kind of training that would enable them to become sergeants and pass the sergeant's examination.

THE COURT: I think, as I recall the terms of the amended complaint, it is sufficiently broad to cover the practices as well as the examination itself. I will receive it for that purpose. If I find the complaint doesn't cover that, I will disregard it.

Go ahead.

Q Would you please go on.

THE COURT: You had better repeat the last question.

Q The last question was, the kind of training --

THE COURT: Does the ordinary person have.

THE WITNESS: Well, normally you will get two weeks on a day shift, which will familiarize you with the institution, the grounds, and the various buildings there; and then you will go on night and you would work with another experienced officer for at least two days and then you are on your own.

THE COURT: Mr. Liburd, was there, as far as you know, any special reason why you didn't receive more training

than you did? Was it busy or was there an emergency or shortage of help or anything of that sort that would account for your receiving such a limited amount of training?

THE WITNESS: Well, I was placed on the midnight to 8:00 shift. When I came there I was informed by the assistant deputy superintendent he would terminate me.

THE COURT: Terminate what?

THE WITNESS: My status as a correction officer. He didn't feel like the black officers should have the same amount of money as the white officers.

THE COURT: He said that?

THE WITNESS: Yes. He said, "I am putting you on the midnight to 8:00 shift and you can do the rest of your bit there," a bit being like jail time.

THE COURT: I see.

Q What assignments did you have after that, Mr. Liburd?

A After two years, approximately, they put me on the mounted patrol, which is horse patrol. You ride around the facility between midnight and 8:00 on fire watch.

Q What hours? I am sorry. You said midnight to 8:00. From when to when did you do that?

A From October to April. I rode in the winter months only.

THE COURT: On horses, you say?

THE WITNESS: Yes.

A Being that you are the only one out at night it was kind of dangerous in a way because at the facility all the inmates were inside and you had to saddle your own house and you were on your own.

THE COURT: Is this the only outside job in the winter on that shift?

THE WITNESS: Yes.

Q What happened in April?

A The job was given to other officers, other officers that had other jobs that wanted to have the summer time. They usually work in Grossinger's, the Concord or something like that. Then I was put back on the gallery.

Q Did this happen for more than one year that you were in the winter riding outside and in the summer you were in the gallery?

A Yes, for three years, until they got rid of the hourses.

Q Do you remember approximately the coldest it got when you were outside on mounted patrol?

A Sixteen below zero.

MR. KANTOR: I really must object to this line of questioning. I think it is wholly beyond the scope of what is even arguably relevant to the question.

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THE COURT: I think the question of temperature is. Maybe not. I take it the plaintiffs are arguing that they were discouraged from staying in the service, and so on. For the moment I will hear this testimony. It will be possible for you to argue at a later date it is not relevant.

MR. KANTOR: Thank you.

Q Had you ever requested that you be put on a day shift during the period that you were on from 12:00 to 8:00?

A Yes, continuously. That was before we got seniority and they have to place you on days by seniority, or other shifts. But at that time it was strictly if the superintendent wanted you to go on days you went on days, if not you stayed on that shift.

Q Were you ever allowed to change from night shift to day shift?

A No, not until '68, I believe.

Q What have your duties been since then?

A Well, I have been relief duty officer and vacation relief. When somebody else is off I take their job. That was until I was loaned to the training academy.

Q Did you perform most of the different jobs that a correction officer performs?

A Yes, I did.

Q Did you do any group counseling work?

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A Oh, yes, I have two groups now and I started the Black Afro Study Group. At Wallkill was the first in the State of New York at a correctional facility.

Q When did you do that?

A Since I got on days in '68, '69.

Q Is that program still operating?

A Yes, it is.

THE COURT: Black Afro, did you say?

THE WITNESS: Yes, Black Afro Study.

Q Have you ever served in any other facility?

A Yes, I served at -- I was on loan again to Attica Correctional Facility right after they had the riot.

Q How many black officers were at Attica when you went there to serve?

A I worked 12:00 A.M. to 12:00 P.M. I worked 12:00 A.M. to 12:00 P.M.

THE COURT: That is not what you are being asked.

THE WITNESS: I can't guarantee but I was the only one I saw, because they finally put me on the other shift so I could work the visiting room.

THE COURT: On the night shift you didn't see any others?

THE WITNESS: No. When they finally put me on the day shift, I didn't see anybody else; but then I requested

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to go back to my facility.

Q How long were you at Attica?

A Three weeks.

Q What supervisory ratings have you received since you have been a correction officer?

A Would you rephrase?

Q I understand periodically you get a rating or an evaluation.

A Oh, evaluation. Satisfactory.

Q Have you taken any in-service training courses or any educational courses related to your work since you have been at either Ossining or Wallkill?

A Yes, I have. I have taken the 52-hour training program; I have taken courses -- to give group counseling you have to be qualified to give the course. I went to the FBI Training Academy in Peekskill, New York. I came out as a defensive tactics instructor.

Q Any other courses that you can recall?

A Well, I tool a pump operator's course to learn about firematics, which is part of our job.

Q Firematics?

A Yes.

Q Is that like firefighting?

A Yes. At my own expense I went to St. Lawrence

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University for the seminar with Sergeant Hayes at Sing Sing.

THE COURT: Where was that course given -- at Sing Sing?

THE WITNESS: No, St. Lawrence University.

THE COURT: You mean you went with Sergeant Hayes of Sing Sing?

THE WITNESS: Right.

Q And you paid for your -- you had to pay for that course?

A Well, normally the state will send you, but they said they had their quota of individuals to go. So I wanted to go very badly, so I paid my own way.

THE COURT: What was the subject of that course, again?

THE WITNESS: It's a seminar. They give you the new concepts in criminology.

Q Have you worked at the training academy?

A Yes.

Q Have you been permanently assigned there for any period?

A Well, I was on loan from Wallkill and I worked there approximately seven, eight months.

Q But you worked -- while you were there you worked there the whole time?

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A Right.

Q When was that?

A Well, from October to May.

Q What years?

A Of '72 to '73.

THE COURT: This last October, right?

THE WITNESS: Yes, until May.

Q What did you do at the training academy?

A I was an instructor.

Q In what courses?

A Defensive tactics and black Afro studies.

Q Any others?

A Human relations.

Q Why did you leave the training academy in May?

A Well, they were going to move the facility, which they have since then. They moved it up to Plattsburgh, New York. Plus I wanted to get back to my facility because my inmates needed me.

Q How did you know that?

A Well, I used to pick up my checks and you still see some of the people in the streets when you come down to the city and whathaveyou and they felt like I deserted them because the other black officer they had, they had him on night.

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Q Have you been involved in any kinds of special programs outside of the institution that are related to your work?

A Well, Youth in Action, Mobilization for Youth. I did a lot of voluntary work for that and the Boy Scouts.

Q Did you take examination 34944, that is, the 1972 examination?

A Yes, I did.

Q Did you receive a passing score?

A No, I did not.

Q Did you take the 1970 examination for promotion to sergeant?

A Yes, I did.

Q Did you take any prior examinations?

A Yes, one prior to that, that I passed.

Q That you passed?

A Yes, I passed it.

THE COURT: You weren't reached, though?

THE WITNESS: No, I have the card here.

THE COURT: That list has expired now?

THE WITNESS: Yes, it is.

Q Do you recall when this examination was given?

A Not exactly. It was the exam prior to this -- the third exam from this, which was probably roughly about

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six years ago.

MRS. GREENBERG: I would like to mark this for identification Plaintiffs' Exhibit 41.

(Plaintiffs' Exhibit 41 was marked for identification.)

Q I am going to ask you if you know what this is.

A Yes.

THE COURT: Would you say it for the record, though.

THE WITNESS: That's my promotion card for sergeant, Grade 15, at the time, title 1439, correction sergeant.

MRS. GREENBERG: I would like to offer this into evidence, Plaintiff's Exhibit 41.

MRS. GORDON: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 41 was received in evidence.)

MRS. GREENBERG: I would like the record to note that Mr. Liburd's final rating on examination 1439 was 76.7 and his rank or code was 153.

Q I would like you to try to remember as best you can the 1972 sergeant's examination and just tell me whether there were any aspects of the sergeant's job as you have

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observed the sergeant's job over the last 12 years that were not tested for, that were not covered on the examination.

A Oh, definitely.

Q What were those?

A The exam was basically security and management. The work now with inmates is definitely human relations and resocialization, and the exam was negative. There wasn't one question on first aid, which is the major part of our job. They had one question that I can remember on the whole exam about firematics, and that was the color of the top of a fire extinguisher.

Q Mr. Liburd, when did you first hear about this lawsuit?

A I really can't recall. I heard something about it up at the training academy and then around January or February I found out it was true.

Q From whom did you hear about the lawsuit?

A Sergeant Hayes.

Q Were you in favor of it at the time?

A Yes.

Q Are you still in favor of the lawsuit?

A Oh, yes.

Q Do you feel qualified to be a correction sergeant?

A Definitely.

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Q I just have one more question.

I asked you before whether there had been any correction officers above the rank of officer at Wallkill, and you said that there had never been.

A Blacks, no.

Q Have there been any provisional black correction sergeants or Hispanic correction sergeants at Wallkill?

A No.

THE COURT: Other than himself. Oh, he hasn't been one?

MRS. GREENBERG: No.

THE COURT: There have been no provisionals at all?

THE WITNESS: No, I didn't get the provisional appointment.

Q Do you remember what your scores were on the 1970 and 1972 sergeant's examinations?

A Yes. In the 70s. Prior to them changing the mark it was 75 was passing, and it was in the 70s.

THE COURT: It was in the 70s?

THE WITNESS: Yes.

Q Let's take one exam at a time. On the 1972 examination, this last one.

A 60.

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Q Your score was 60?

A Yes.

Q Do you recall what score you got on the 1970 examination?

A That was 72, I believe.

Q But that was not a passing score?

A No.

Q You testified before that I think it was the deputy superintendent at Wallkill --

A The assistant deputy superintendent.

Q The assistant deputy superintendent at Wallkill said he would bury you?

A On the night shift.

Q When were those remarks made?

A That was October, '63, when I came to the facility.

MRS. GREENBERG: I have no more questions.

CROSS EXAMINATION

BY MRS. GORDON:

Q Mr. Liburd, you mentioned that you completed a 52 weeks course --

A 52 hours.

Q I am sorry. 52 hours, 52-hour training course, a counseling course, and the FBI course. Were those courses all conducted under the Department of Corrections auspices?

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A Yes.

Q And with respect to your attendance at St. Lawrence University, that was a program sponsored by the department but you paid yourself in that particular instance, is that right?

A Yes.

Q You were first assigned to Ossining, is that right?

A Yes, I was.

Q When was that, approximately?

A January 19, 1961.

Q When you were assigned in Ossining in 1961, was it common practice at that time for new officers coming onto the job to be assigned to the night shift rather than the day shift?

A What do you mean by common practice?

Q Well, when a new officer came to Ossining in 1961 -- did you say that is when you were there?

A Yes.

Q In 1961 or so, where was it most likely for you to be assigned, what shift, if you know, the night shift, the day shift?

A Normally you would be on the commando shift, the 9:15 to 5:30 shift.

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Q Did they have a commando shift at Ossining in '61?

A Yes, they did.

Q And what shift were you on when you went to Ossining first?

A First?

Q Yes.

A 9:15 ro 5:15.

Q Did you do any night shift duty at Ossining?

A Yes, I did.

Q How long did you do night shift duty at Ossining?

A Six months on the 4:00 to 12:00 and six months on the 12:00 to 8:00.

Q Now, you mentioned some incident at Wallkill or practices at Wallkill.--

A Yes.

Q --with reference to your being assigned to the galleries, I believe it was, and to the night perimeter tour in the wintertime.

A Yes.

Q Is that a fair statement? Who was it that assigned you to those duties?

A Well, it comes from the superintendent's office.

Q You mentioned a deputy superintendent. Was he

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responsible?

A Assistant deputy superintendent.

Q What was the name of the assistant deputy superintendent who did this?

A Walter Mason.

Q Is he still at Wallkill?

A No, he has since retired.

Q O.K. Now, when was it that you served in the galleries without too much training, I believe you indicated, or you rode the perimeter; what time or for how many years?

A I rode for three years.

Q Was this prior to 1968?

A Yes. It ran into 1968.

Q At that time were all the assignments made by the assistant deputy superintendent or the superintendent?

A Yes.

Q Did there come a time when assignments of officers were made through the bidding system?

A Yes. They started in '71.

Q In '71 at Wallkill?

A Yes.

Q How about in '68, was it in use at that time?

A No.

Q Was there any change in the manner in which

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assignments were made from '68 to '71 at Wallkill?

A No.

Q With reference to the present bidding system as it operates at Wallkill, what is the basis for an officer getting a particular assignment?

A Normally, his qualification and years in the department.

Q In your opinion, is the present bidding system as it's practiced at Wallkill discriminating against you?

A No.

Q Between May of 1973 and the present time, how many, if any, provisional sergeants were made -- I believe that's the right word -- were made at Wallkill? And I exclude from that people coming off the 34944 list who would have been made permanent but for the court's order.

Let me rephrase the question.

Were any provisional sergeants made at Wallkill between May and this time without regard to the examination?

THE COURT: May of '73?

MRS. GORDON: May of '73.

A That I wouldn't know.

Q You mentioned that you were never made a provisional sergeant at Wallkill, right?

A Yes.

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Q Can you estimate for us how many officers were made provisional sergeants at Wallkill let's say between the time you got there and the present time?

A Just three.

Q Just three. And when did you come to Wallkill?

A '63.

Q So between '63 and the present time only three officers have been made provisional sergeants, is that right?

A Prior to the last list.

Q Prior to the 34944 list?

A Right.

MRS. GORDON: Thank you. That's all.

THE COURT: Anything further, Mrs. Greenberg?

MRS. GREENBERG: Yes.

REDIRECT EXAMINATION

BY MRS. GREENBERG:

Q You stated that there were three provisional sergeants prior to the provisional appointments that were made from the list?

A Yes.

Q Can you tell me the names of those persons, the provisional sergeants?

A Yes. Fred Earl, Ronald Beismer and Charlie Shields.

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Q Do you know when each of those three men started as a correction officer? Do you know when Fred Earl became a correction officer?

A He has more seniority than me, but I couldn't tell you the exact date. In fact, all three officers had more seniority.

MRS. GREENBERG: Thank you.

THE COURT: Thank you very much, Officer.

(Witness excused.)

MR. BALLER: I call Mr. Samuel Taylor.

MRS. GORDON: Your Honor, I would like to make it clear on the record it is my understanding plaintiff is calling this witness because of the situation that arose with the expert testimony to be offered by defendants. Ordinarily we would have called him on our own case. We certainly have no objection to plaintiffs calling him.

THE COURT: Thank you.

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GWP 1

S A M U E L T A Y L O R , called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BALLER:

Q By whom are you employed, Mr. Taylor?

A The New York State Civil Service Department.

Q That is the defendant in this action?

A Yes.

Q And what is your job title?

A I am a chief personnel examiner.

THE COURT: A chief or the chief?

THE WITNESS: The chief.

Q Do you recall my taking your deposition on Tuesday, June 5th, of this year?

A Yes; I do.

Q Were you designated to represent the defendant, the Civil Service Department, for that examination?

THE COURT: You mean, questioned in their behalf?

MR. BALLER: That's correct.

A I believe so.

MR. BALLER: The notice of deposition will reflect that.

Q Could you very briefly summarize the different job titles that you have had with the Civil Service Department?

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A With the New York State Civil Service Department I have held at first the position of associate personnel examiner; then a position of principal personnel examiner and now chief personnel examiner.

Q During what period did you hold each of these jobs?

A From 1962, when I came with the department, for about five years, I believe I was an associate, then a very short period as a principal and for the last four to five years, I believe, as chief.

Q Where did you work prior to that?

A The City of Philadelphia Personnel Department.

Q That was also personnel examination work?

A Yes; it was.

Q Would you briefly summarize your educational background?

A I have a Bachelor of Arts degree in political science and history. I have a year of graduate study in political science and public administration. That's it.

Q Where did you receive those degrees?

A The first was in Weidner College in Pennsylvania. The second one, or the graduate study, was in Michigan State University.

Q Did any of this educational training involve professional work in the field of civil service examinations?

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A No; it did not.

Q Did it involve industrial personnel work?

A No.

Q Did any of it involve corrections work?

A No.

Q Have you taken any courses outside the formal educational background in any of these fields?

A No; I haven't.

Q Would you briefly summarize what your duties are as chief personnel examiner?

A I am a section head. The section is the selection process evaluation section. It is in the examinations and staffing services division. The division is divided into two bureaus. One is the staffing services bureau, and the other is the test development bureau. There is a director of the division. I report to the director in a staff capacity and, as the title of the section implies, I and my staff are responsible for evaluating the examining program in whatever dimensions seem relevant.

Q What is the relationship between your personnel responsibilities in this examinations bureau within the division?

A The test development bureau?

Q The test development bureau. I am sorry. Do you

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supervise those people?

A No, not directly. We pre-audit many of their activities. We have a number of persons each responsible for an occupational area who review their activities in connection with affirmative action, ethnic research.

The affirmative action officer and the research director are in my section, report to me in connection with the job relevance of the examinations they give, recency of job audits, whether the records seem to be complete, is it possible to do a criterion study or whatever kind of demonstration would be possible as to whether or not the examination is working effectively, is doing what we want it to do.

Q Are you ultimately responsible, then, for those aspects of quality control in the development of examinations?

A Yes.

Q Does your responsibility cover only corrections examinations or does it extend to other types of examinations?

A Other types.

Q Do you have within the section you head what is, I believe, known as a research project?

A You are probably referring to the project that is dealing with correction titles.

Q Yes. Do you have such a project?

A Yes.

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Q Would you briefly state what it is?

A About a year and a half ago, it became known to me that it would be possible that we could get a Federal grant under the inter-Governmental personnel act to support certain research activity, particularly if they might have general usefulness or applicability across the field or in other states and so on.

Now, the thing in which we are very interested was the large-scale data processing devices which have become available in recent years and never were before. Of course, the thrust of the ethnic groups, the thrust to demonstrate, for example, the value and utility of a program in as many ways as possible, and I felt that it would be possible to use those data processing devices and some of the increased staff capability, say, in statistical analysis, research design, that we would explore the possibility of setting up a continuing project kind of organization to carry out exams rather than the functional organization which we had.

Now, there were two schools of thought in the department at that time. One favored functional type organizations, largely because of extreme volume that is handled and the requirement to specialize. In effect, some of the activities go on subject to differing constraints and different pressures.

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Another school of thought is that the best approach would be to integrate all the various functions and operations, vertical integration, so that the same person is responsible for carrying out everything in connection with a selection program from the beginning to the end.

We were in the process of reorganization at the time. I think if you read the grant request, you will easily see which school I adhered to. But the other side sort of won. But we thought it would be very wise on our part to try to experiment with this project kind of organization, and so I drew up this grant request and presented it to the Federal people in Washington, and they asked me a lot of questions about it, and finally we did get the grant.

THE COURT: Was it from FELA?

THE WITNESS: No. I think FELA is different funds. I am not too clear who puts it up.

THE COURT: Let me be sure I understand the difference between the project and the functional organization.

The functional organization is the organization you have now; is that right?

THE WITNESS: Yes.

THE COURT: And that means the different aspects of a particular examination or examination to recruit a certain specific class of people is spread out, I gather, whereas your

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idea was to explore the possibility of having a project organization which, if I understand you correctly, would see to it that certain specific people worked on the recruitment of only one group or set up exams of only one type. Is that it?

THE WITNESS: No, not exactly. The first part of that is so, the specialization, and some people make up tests, some people recruit, some people do job audits and go out and do field audits, and, of course, this is the theory, although it is often violated in practice, in the fact that a person may -- his operations actually will spread out and overlap someone else's concept.

On the second one, though, the idea was that if we could assign a meaningful selection area, for example, a series of titles in some occupation, and then we would have a squad of people who were expert in field audits and expert as well in, say, data analysis, writing test questions or getting people to write test questions for them and all these different aspects that are now separated into different specialties, and they would do, say, a series like the correction series, officer, sergeant, lieutenant, and then when they were through with that they would take these same skills and programs and forms, and they would move over and do the engineering series or administrative series and actually

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prepare several occupations that I would like to do.

THE COURT: Sort of a team?

THE WITNESS: Yes. The people would move around as a team, although sometimes the team member, he might be a member of one team today, this morning, and then he would go somewhere else and be on another team that afternoon.

It's a very loose kind of organization structure rather than the more common type.

Q Is that project headed by Mr. Ken Siegel?

A He is the project leader, yes.

Q He reports to you?

A Yes; he does.

THE COURT: You say "that project". You mean the exploratory business?

THE WITNESS: Yes.

Q Mr. Taylor, will you please examine Exhibit 26, which I have laid before you? Those are the testing guidelines of the American Psychological Association. You are not a member of the American Psychological Association, are you, Mr. Taylor?

A No; I am not.

Q Are you familiar with those guidelines?

A Yes; I have read them.

Q Do you consider them to some degree relevant to

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the work of your section?

A To an extent, yes, they are.

Q Could you explain to what extent they are relevant and to what extent they are not?

A Well, I will start with the larger category, the extent they are not.

I believe they are written and addressed to consulting firms and educators, persons who construct tests the use of which may be rather remote from them, the users of which may really have no opportunity to consult or be involved in the process of constructing the test, only in using it. So that it seems to me what they were setting up were documentation standards more than anything else. With the user remote from the constructor, he needs to make intelligent use of the things which are applicable --

Q To clarify that, you would not consider your department to be in that category? In other words, you develop the exams, and you use them?

A Yes. The same person develops the questions, works closely with the people from the agencies, the subject matter people. There is a much closer relationship than would be, say, for a publishing house or an educational testing service, something like that.

Q I am sorry I interrupted you. Please continue. I

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wanted to make sure that was clear.

A That is the essential part that I feel not really applicable.

The part that is applicable, of course, is the commitment by these people to the need for demonstration of the efficacy of what you are doing. They don't get very far into methodology, and, of course, I suppose they couldn't in a thing like this, but they have this commitment to rational demonstration of why you are doing something and what the effect of it is.

That is applicable. I think it is applicable to any testing organization.

Q Is that basically what is known by the term of "validation"?

A Yes. Broadly, yes.

Q Insofar as those guidelines are relevant to the situation your section works in, do you attempt to adhere to the standards of the guidelines?

MRS. GORDON: Excuse me?

MR. BALLER: I am referring to Plaintiffs' Exhibit 21/52 always.

A In the sense I described it, of course, we are committed, certainly, to some kind of demonstration or checking on our --

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THE COURT: That is a matter of spirit or philosophy. I understand that. Do you actually utilize this document in any way in your own organization? Do you require your own people to measure their own work in relation to it, or anything of that sort?

THE WITNESS: We require them to measure their own work.

THE COURT: In relation to this?

THE WITNESS: In relation to the philosophy of this, sir. There are practically no details or operational details in here.

THE COURT: All right.

Q Do you or any of your subordinates make reference to it in the course of your work?

A I once read it. I doubt if I referred back to it.

Q Insofar as we are talking about validation -- and let me use the term loosely -- would you say that the standards contained in those guidelines are proper standards?

A Yes; case by case.

Q Now please look at Exhibit 27, which is also before you, what is known in the trade as the EEOC guidelines. They have a technical name which is printed on the document.

Are you also familiar with those?

A Yes; I am.

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Q Is reference also made to the standards contained in that document in your office?

A Yes. These have been distributed to the staff and were excerpts from a number of other documents bearing on the same subject. That is part of the affirmative action effort.

Q Do you subscribe to the standards contained in those guidelines?

A Yes.

Q Do you think they are proper standards for application to civil service examinations?

A I would say that they are standards that would be applicable to any personnel testing activity.

MR. BALLER: I would like to offer these two exhibits, 26 and 27, into evidence.

MR. KANTOR: If your Honor please, I believe under the Federal Rules, since these are in the Public Register, they need not be offered in evidence.

THE COURT: They don't have to be, but it is more convenient for us to be able to refer to them.

MR. GORDON: We have no objection.

THE COURT: You are talking about 27?

MR. KANTOR: Yes.

THE COURT: There is no objection to 26 or 27?

MR. GORDON: No, your Honor.

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THE COURT: Received in evidence.

(Plaintiffs' Exhibits 26 and 27 for identification were received in evidence.)

Q Mr. Taylor, are you basically familiar with the procedures by which Examination 34944 was developed?

A Yes.

THE COURT: That is 18 and 19?

MR. BALLER: I am going to go through them in just a second, your Honor.

THE COURT: All right.

Q I would like to ask you if the exhibits which I placed before you, which were all discovery documents prepared by the defendants, accurately summarize those procedures, and let me do it specifically.

Could you first look at Plaintiffs' Exhibit 3, at the material following page 24 and numbered separately beginning with page 1?

A Yes.

THE COURT: Wait a minute. After page 24?

MR. BALLER: That's correct.

THE COURT: And numbered page 1?

MR. BALLER: Page 1 et cetera.

THE COURT: All right.

MR. BALLER: To the end.

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Q Does that generally summarize the steps in preparing the examination and administering it and scoring it?

A Yes.

THE COURT: Could you read me the first few words of what you are talking about?

MR. BALLER: Certainly. I am referring here to page heading "19", "20" and "21", but the important part of it really begins with respect to subdivision C of interrogatory 19. The several paragraphs following that set out the responsible persons, and over on the following page, number 2, there is an underlined heading called "description of the development et cetera", and the following pages are, I believe, a narrative statement of how the examination --

THE COURT: I regret to say that my copy of that page 2 at the bottom is almost completely illegible. I don't need it now. Be sure you hand in a readable onewhen the time comes

Q Is that a general summary that was prepared with your assistance for the purpose of describing the process for this litigation?

A Yes.

Q Would you look also at Plaintiffs' Exhibit 14, which I have handed you?

MR. GORDON: Counsel, could I inquire on Plaintiffs'

Counsel

Exhibit 14, you have it marked "three pages". I found only a one-page description. If you have a three-page one, I would like to see it.

MR. BALLER: Your counsel would like to see my copy (handing to Mrs. Gordon).

That's correct. The second two pages are headed "Project Description" and are slightly different.

MR. GORDON: Fine. Thank you.

Q With reference to the first page of that exhibit only, is that a short description of the steps leading up to the examination?

A Some of them, yes. This deals mostly with which exams would be held at this time, this particular page, although it does refer to the scope of the written test.

Q Now please look at Exhibit 10 before you. What is that, briefly?

A This is a combination of two things. When the project team was set up, we had a fairly regular practice --

THE COURT: Before you go into that, can you tell me what the source of this document is? Is it excerpts from meetings held? Is this from your organization? What is it?

THE WITNESS: It is from me; from my organization.

THE COURT: I see. And these are notes made by people in your organization?

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THE WITNESS: Well, we have a project diary idea that when people are running a project they keep a diary, just in case they want to refer back at some time.

THE COURT: Did you keep this diary, or somebody else?

THE WITNESS: In this particular project, one of the people was responsible for keeping this diary. The reason I say it is because of two things. There are events I see on the first page which occurred before this diary was started, and these were reconstructed from various sources, calendar pads and memos in the files and things like that, I believe. I would have to have the original to segregate them.

THE COURT: I am sorry I interrupted the answer to the question that you asked. Ask it again.

Q What is that document, just briefly?

A It is essentially a chronological run of events which had to do with this examination.

Q Prior to the examination only?

A No.

Q Does that continue after?

A Yes.

THE COURT: You mean prior to the administration of the examination?

THE WITNESS: It does continue for quite some time

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after.

Q So that includes steps both before and after the administration of the exam?

A It includes saying that there is a suit in Federal Court.

Q Let's look at Plaintiff's Exhibit 9. Tell us briefly what that is.

A This is a memo to the file from Mr. Etter.

THE COURT: Who is he?

THE WITNESS: He is a section head in the staffing service bureau of our department. That bureau is organized by agencies. The Corrections Department is one of the agencies for which he is responsible.

This is a memo to the files recording the events that happened at a meeting that was held on June 1st and having to do with this examination.

THE COURT: June 1, 1972; right?

THE WITNESS: Yes. It had to do with planning for this examination.

Q Were those four documents taken together, that is, the end of Plaintiffs' Exhibit 3, Plaintiffs' Exhibits 14, 10 and 9 -- Do they, taken together, provide a rather thorough and narrative description of how the examination was decided upon and put together and written and administered and scored?

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A Yes; it seems so.

Q I would like to ask you some specific questions about various steps in the process, but so that his Honor can follow where they fit in, could you very briefly summarize what is laid out in much more detail in those documents of how the examination was developed?

A I will try. It became known, I believe in the spring of 1972, that the eligible list for sergeant was exhausted and that there were some new positions, and it would be necessary --

THE COURT: Excuse me one moment. Is either of the parties or both parties ordering a transcript of this? I am not trying to put any pressure on anybody. If it is being done, it will be available to the Court to consult, and I can listen to this without trying to take notes.

MRS GORDON: I have ordered a transcript of Mr. Taylor's testimony. I have not ordered any other.

MR. BALLER: I have not ordered anything else, but I am planning to order a daily transcript of this.

THE COURT: I understand the reporters may not be able to get it out on a daily basis.

MR. BALLER: If we can't, we can't.

THE COURT: But we will have it for post-trial consideration.

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MR. BALLER: I thought we might need it for Friday for expert witness commentary.

THE COURT: Mrs. Greenberg had better take notes, then, or somebody.

Mr. Taylor, you were saying in April you learned that they needed more sergeants.

THE WITNESS: Some time in the spring, it became known they would have to fill positions, and the eligible list was exhausted. In civil service it is a sort of crisis condition in a large uniform class, and it seemed it would be necessary to make provisional appoints. So the people got together, and they -- the personnel people from the agencies, from our department, all the people who had an interest in it who normally would get together, got together and decided they would hold an examination, and, as it turned out, in October. I really don't recall whether they discussed holding it at some other time, but around October.

Of course, there were many details. One of the details was what kind of exam we are going to have. So it turns out that prior to that time this project that you know about, that we talked about a few minutes ago, had been talked about, and there was a lot of interest in the corrections personnel situation. There was a lot of interest in it, and so certain persons -- personnel examiners were

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designated to put together this examination. So they had a scope conference, and this memo of June 2nd, I believe, reflect that scope conference.

Q For the record, that is Plaintiffs' Exhibit 9.

A Very well. It may be.

So they had this scope conference, and they decided what would be covered in the examination, and this was cleared with the Corrections Department. They agreed on when it would be held and what it would cover.

Now, it turns out, too, that in 1970 a large number of field audits were made of various correctional facilities. I think they visited eight or nine correctional facilities and some hospitals, and so they had a lot of job audits, and they changed the specification in '71.

Now, an examiner was assigned to this who had been involved in some other studies in connection with the Corrections Department and was familiar with this record, and because of the urgent need also, Correction was unusually cooperative and supplied some consultants on a more regular basis than we might otherwise be able to get them, and they decided that three persons would be assigned to work with the examiner, putting together this examination.

Now, these people got together, and they discussed, and they wrote questions, and they reviewed each others'

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questions, and through this process of talking and considering they did put together the test, and they also ordered some test materials from certain specialized test development units in our department, and this was put in --

Q Let me interrupt again, Mr. Taylor, just because I am not sure it is quite clear.

You say they developed a test. Does this refer to the three people from the Corrections Department who were working with civil service personnel as well as the civil service personnel?

A I say it refers to the examiner more th as you put it. It is a joint effort. The examiner and these three technical advisors -- When I say "they", that's who I meant.

THE COURT: May I ask -- I am just imagining how such a process might work out, and I don't know that my imagination is correct or not -- I suppose the examiner gets together with the people who are actually in Correction, and he says, "I understand the scope. What is it you want to ask questions about?"

He knows something about the job itself, or there is literature in your department which tells him about the job. Then would he or he and his staff draw up a list of proposed questions and perhaps submit them to the Corrections people and say, "Now, this is the kind of thing we might do.

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What do you think?"

How does the project normally work?

THE WITNESS: By and large, that's true. This will be a rather elaborate review by the examiner of the classification division files to get whatever record he can find. It is a review of the record and old exams, too.

The previous examinations are reviewed, and the results of them are discussed, of course.

When you say, are these submitted for review by Corrections people, the Corrections people on the questions themselves would be people working as technical consultants.

THE COURT: I understand that. But they are out of Corrections; right?

THE WITNESS: Yes. Of course, the examiner is really in control of the situation. He is in charge. Ultimately, if there is a disagreement or something, he would probably be the one.

THE COURT: You have gotten to that point where you said these conferences had taken place. I suppose an exam begins to take shape?

THE WITNESS: Yes. They have the conference on what will be in the examination in the first place, when it will be held.

THE COURT: What you call the scope conference?

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THE WITNESS: Minimum qualifications. That is subject to review. We have a tentative announcement which sort of sets down decisions that have been reached, and these are, of course, subject to review on input from higher officials in the Corrections Department, who often have opinions on it.

So these questions were written and put together, and the test was scheduled for October. So they had the test, and it came back, and the papers were scored, and this is a standard process, which I don't suppose I have to get into too much.

Q I don't think there is any challenge to the way the papers were scored.

A Now, there is a review process. All the candidates are invited to come to the facility and look at the test questions in terms of whether the answers are correct, whether it seems relevant, whether it is important or not, one thing and another. Whatever objections they may want to make about this examination, that is the opportunity they have to make them.

THE COURT: When does that occur?

THE WITNESS: About a week after the test.

THE COURT: Before they are graded?

THE WITNESS: Yes; before they are finally graded. There is a tentative key which will be put in so that the

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processing system can start running. It has no final effect. It is called a tentative key. When they are there, they have this in front of them, the answers, and they make what they call an item analysis, too, to check whether or not there may be some bad keys or bad answers in the test.

So this was done, and then these were reviewed in the normal process, which I believe is laid out there, and then finally a final key is determined, the papers are scored with this final key, and the eligible list is set up and then signed. It is a kind of legal requirement.

I left something out. I am sorry. A determination is made on where to set the passing point.

THE COURT: When is that made?

THE WITNESS: After the papers are scored, the examiner is given a distribution of scores, how many got this score, that score and the other score, and also sometimes by location.

Now, he will know if we set the passing point here we will have so many eligibles at this location or that location.

Also, there are a number of titles being covered here, not just correction officer. They are covering some others. Then there are people who cross-filed. So what may look like two eligibles is in fact only one person.

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Now, these matters are discussed between the examiners and the Corrections Department persons to see that there will be enough people passing -- taking these things into account -- to cover the number of expected vacancies.

THE COURT: Hold it there a minute. Am I to understand, then, that the passing grade in an examination of this kind is really -- its function is really more for the purpose of regulating the number of people who will then be in line to take the job than it is to declare that a man is qualified or not?

For example, if you decide to set the passing grade at 75 instead of 70, it would seem to me -- maybe I am wrong -- that a man might be qualified to take the job even if he got a 70 but that you are in effect saying, "If we put the passing grade at 75, we will have enough people to accomplish our purpose."

Is that a correct and fair analysis?

THE WITNESS: Yes; I think so. Other matters were considered, but that is the main thrust of that decision, yes.

Q I have handed you Plaintiffs' Exhibit 5. Is that the eligible list that came out of the examination process you have just described?

A Yes.

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Q That also reflects that certain individuals on the list got veterans' credits, doesn't it?

A Yes; it does.

THE COURT: By the way, how much of a credit do veterans get? Or does that vary?

THE WITNESS: It does vary. I am not positive. I can see here two and a half on the list.

THE COURT: Is that points?

THE WITNESS: That is points. This would be after everything else is finished you get two and a half added on, and I think you can get five points, too. Yes. Here is five, Apparently it is two and a half or five.

THE COURT: It is a matter of curiosity to me.

Q Do you also know whether some of the scores on the eligible list reflect additions for seniority points?

A Yes. I know this was part of an announcement, yes.

Q Does Plaintiffs' Exhibit 13, the third page of that exhibit, summarize the seniority points, the factors that are taken in? It is the third and fourth and fifth pages of that exhibit.

Those are Department of Civil Service policy manual excerpts, I believe, are they not?

A They are, definitely.

MR. KANTOR: Is counsel referring to Plaintiffs'

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13, which is Civil Service Rules and Regulations?

MR. BALLER: Right.

THE COURT: I see what you are talking about.

A (Continuing) I would have to assume that these are in fact copies of the procedures for that list.

Q Do you know the maximum seniority credit available?

A No.

Q I would have to speculate. It is probably in that exhibit. So that a man's final scoring is determined by his test score plus his veteran's credit plus seniority credit, if any?

A Yes.

Q Would you state, please, what you understand by the term "scope of an examination" or this examination?

A This is a statement of the subject matter area such an examination will cover. It is put on the announcement and it is used to guide the candidates in preparing themselves for the examination to whatever extent they can.

THE COURT: I take it there is such a statement for all civil service examinations.

THE WITNESS: Yes, in New York State.

Q Plaintiffs' Exhibit 8, which is in front of you: Is that the official scope determination for examination 34944?

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A No; this is something else. These are sub-test descriptions. The scope statement is merely a statement of the general heading. I see the first one on top is "Using good judgment in the correctional field." This particular form is something used by examiners to set down perhaps an expanded definition of the knowledge they are going to cover and a description of the kind of questions that they expect to ask to cover that.

Q Do the sub-test titles at the top of each of these five pages constitute a statement of the scope of the examination?

A I believe they would, yes. The thing that would appear on the announcement, yes.

Q Did you have anything personally to do with the determination of the scope of this examination?

A No; I did not.

Q Who was responsible for that?

A It would be a number of people, some from Corrections, some from the test development bureau and some from the staffing services bureau.

Q Was Mr. Siegal involved in that?

A Yes; very much so.

THE COURT: Who is Mr. Siegal?

MR. BALLER: Mr. Ken Siegal will be a witness for

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the defendants.

THE COURT: Who is he?

Q What is his title?

A He is an associate personnel examiner.

Q Does he report to you?

A Yes; he did not at that time.

Q When did you become personally involved in the development of this exam after the scope was defined?

A I believe around August, somewhere around the first part of August.

Q And what was being done at that particular stage?

A Meetings were going on with the technical advisors to make the coverage a little more operational in terms of questions and how many, and there were many questions.

Q You were developing actual questions?

A Not personally, no. I did not participate in that.

Q What exactly was your role in the question development stage?

A Very little. I went to a meeting because I wanted to meet these people, and I stayed during the discussion for a while on different things that may be covered or different things that were going to be covered. They talked about inmate groups and various effects of these inmate groups, behavior, all on a sergeant's job.

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I wanted to meet these people in support of the project and to talk to them for a while.

Q Was it part of your job to make sure the questions that were being written fit within the scope of the examination as defined?

A Organizationally, yes. At that point, there was a peculiar relationship.

Q Will you name the three consultants from the Corrections Department who were working at this time with your associates?

A There was Hy Sperback and a Bill Ciuros and a C. Harris.

Q Is that Dave Harris?

A Dave Harris.

Q And who from your department was working most closely with them?

A Mr. Ken Siegal, Elaine Walters. Those two and some examiners on particular matters.

Q Do you know what if any documentation with regard to the Corrections Sergeant job those people were consulting at that time?

A Well, the rules -- the standard books on laws, rules, certain textbooks. I couldn't specify the exact names, but certain texts and articles, to the extent of the

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experience of these three persons.

Q Do you know whether they consulted at any time any written statements regarding the job of correction officer in the New York State facilities, specifically?

A I doknow that, yes; they did. Wait a minute, now. Let me make sure I understand your question. I know Mr. Siegal -- I just happen to know as a matter of personal knowledge that Mr. Siegal had reviewed the entire classification record and other things.

Q Let me show you Plaintiffs' Exhibit 4, which is in evidence. They are class specifications for the correction officers series. Do you know whether they consulted those documents?

A Yes; of course they did. Is this the last one?

Q This is the 1972 revision.

Do you know whether they also consulted prior versions of these classification specifications?

A I don't know that for a fact. I know, for example, that Mr. Siegal certainly consulted the classification division record of the audit, and there are reports in that file which I believe address themselves to those previous specifications.

Q Let me show you a document which I believe has been marked as Defendants' Exhibit E. It is attached to the

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answers to interrogatories as Defendants' Exhibit 3-A to those answers.

Is that the job audit you were just referring to? It is a rather voluminous pile of documents.

A Yes; it is. Some of these are audits; some of these seem to be reports on those audits.

Q Is that what you were referring to that Mr. Siegal consulted?

A Yes. This is certainly part of the file, in any case. It is a good bit of material.

Q Is that a representative part of the file, so far as you know?

A This is from us, so I would say, yes, I consider it representative.

Q Do you know whether Mr. Siegal and the other people who were writing the test also relied on what we have referred to as the K. S. & A. statements, Plaintiffs' Exhibit 8, which include a definition of knowledge, skills and abilities and definition of test tasks?

A They didn't rely on it. They created these. That was part of what they were doing, was creating this document. Although this is a record of something, it is not what they were really doing. They didn't rely on it, because it didn't exist before they went through their process.

Q It was part of their work?

A It was part of Mr. Siegal's work, definitely.

THE COURT: Is that an exhibit?

MR. BALLER: Plaintiffs' 8.

THE COURT: The one that deals with using good judgment?

MR. BALLER: Right.

Q Do you know if Mr. Siegal and the others consulted prior examinations for the sergeant job?

A Yes; I was told that.

Q Have we summarized the basic documents that were being used at the time the examination was constructed, as far as you know? Any we left out?

A I don't think so.

Q Do you know how much emphasis was pladed on the document marked as Defendants' Exhibit E, the large heap of documents?

THE COURT: The job audit?

MR. BALLER: The job audit.

THE COURT: Job audit and related documents?

MR. BALLER: Right.

A There was considerable reliance. I mean, in context.

Q Are you familiar with that audit?

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A I have scanned these, yes.. Not prior to the exam but subsequently.

THE COURT: Are you coming close to the end of your examination? Otherwise, I would like to take a short recess.

MR. BALLER: I am not.

THE COURT: I would like to see counsel briefly in the robing room.

THE CLERK: The Court will take a ten-minute recess.

(Recess.)

BY MR. BALLER: (Continuing)

Q Were you the principal officer of the Civil Service Department responsible for seeing that the examination was properly drawn up according to the department's procedures?

A Yes.

Q Mr. Taylor, do you know that Defendants' Exhibit E, which is before you, has nothing to do with the correction sergeant job?

A No; I do not.

Q You don't. Could you explain what it has to do with the correction sergeant job?

THE COURT: Let's have it before us. Are you talking about 34944?

MRS. GORDON: Are you talking about the occupational survey?

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THE COURT: The job audit.. Whatever it is that you are talking about.

Q Would you explain what that has to do with the correction sergeant's job?

A These are audits of facilities in the Correction Department and some reports in connection with those audits and conclusions that were drawn from them. It is a fairly standard classification document for a position of this kind.

Q You are saying it is a standard procedure to audit positions?

A Yes.

Q What position was audited in this exhibit?

A The series. That would be officer, sergeant, lieutenant.

As I say, mainly audits for jobs which are largely in facilities, institutional jobs. Usually you go in and audit the entire facility, the operations in a facility of the various persons, the various levels in a series. It is very similar to the project plan which bears on officer, sergeant, lieutenant as a meaningful frame of reference.

Now, the classification division periodically for several years has done an audit on this facility or that facility. At some point they did a rather massive effort and tried to select enough facilities to cover all the

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different types and do them all in a short time frame.

MR. BALLER: Perhaps I can illustrate this with some questions.

THE COURT: Whether you can or not, I would like to ask a question.

MR. BALLER: I am sorry.

THE COURT: I would like to get the feel of what this document is intended to do. It is intended to be a specific description of jobs, or is it intended to be a narrative description of what was observed people were doing when the people who visited the facility were there?

THE WITNESS: I think the latter, your Honor. It is a narrative. It did have a structure, obviously, and these things usually do. They go in, and they try to observe and talk to people on all the various posts to see what operations are being carried out there, and they describe what they observe and what people tell them, and they write all this up, and it comes back and is reviewed by some other persons, high staff levels, and they have meetings and decide what to put on the class specification.

Q Is it your testimony that that document is not specifically a job audit for the job of correction officer and narcotic correction officer and correction hospital officer and correction youth camp officer -- in other words,

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the entry level job of the series?

A Yes, it is. Now, it would follow --

MRS. GORDON: The question was phrased is it your testimony that it is not.

THE COURT: You are saying that is your testimony, is that right?

THE WITNESS: I have lost the thread.

THE COURT: Repeat the last question.

Q Does that audit relate to the entry jobs or the whole series?

A It relates to the whole series. It relates to the facility and the various things that go on in the facility.

Q Do you recall what the occasion of the audit was?

A I believe there was a request for some change in the titles and, of course, in compensation levels because of certain new operations or changing emphasis on different kinds of operations. More particularly, I think the rehabilitation, counseling, that sort of thing in the facilities, and it was thought that perhaps the job should be reclassified, there should be more than one job involved.

Q What job titles were involved in this request?

A I don't -- I am not sure I understand what you mean.

Q You said the audit was done in response to a request for reclassification.

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A I don't think I have seen the request. I don't recally know.

Q May I ask you to take a look at Plaintiffs' Exhibit 7 and see if that refreshes your memory?

THE COURT: Are you going to be going back to this at all?

MR. BALLER: Not specifically today.

THE COURT: I hope you can read yours better than I can read mine.

MRS. GORDON: I am sorry. These get worse and worse the more we xerox them.

A The first sentence --

MRS. GORDON: I may have a better copy.

A I can make out the first sentence.

Q You have seen that before, haven't you?

A I think I have. I have seen something -- I really don't think -- no, I don't think I have seen this specific memo. It seems that I should have, but I don't recall seeing it.

Q Let me read you part of the transcript of your deposition on page 28 of that transcript. It says: "BY MR. BALLER:

"Q Let me show you a letter which is marked Exhibit 4A of the answers to interrogatories which is a letter to

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Mr. William Ciuros by Mr. Cornelius M. Hanrahan. Have you seen that letter before?"

On page 29:

"A Yes."

So you have seen it at least once at the deposition and at least once before the deposition, is that right?

A It must be so.

Q Now, that document referred to in the deposition as 4A, which is Plaintiffs' Exhibit 7 here, that is the request in response to which the job audit was made, isn't it?

A This is a letter from Mr. Cornelius Hanraham, director of classifications, to Mr. Ciuros.

Q I am sorry, that is not the request.

A It seems it would go the other way.

Q Does it describe the request which was --

A The first sentence says: "An application was received from your office requesting reallocation of officer, narcotic officer, correction hospital officer, youth camps and several supervisory levels in each series," and then there are some titles listed here which I can make out running from officer through lieutenant.

THE COURT: I am unable to determine what Mr. Ciuros' position was at the time. President of some council?

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Q He is president of the employees' council, is he not?

A It says here -- he must have been president at that time of Council 82.

THE COURT: Would an audit be made at the request of the president of the union? I am not saying this may not relate to that.

THE WITNESS: In general, a union would initiate requests saying that for a whole series or a whole class duties have changed in the class. I am going on classification experience in general.

THE COURT: That is what I am asking.

Q Does that letter not indicate to you that the main concern of the request was at the officer level and the main thrust of the audit was to see what correction officers were doing and narcotic correction officers and correction hospital officers and correction youth camp officers?

A Well, certainly so, except that I get the impression that you are implying that this is to the exclusion of concern with what their supervisor is doing or the whole series is doing.

Q The main thrust of the --

THE COURT: Mr. Baller, if you are concerned with what the auditor actually did do, it doesn't seem to me it is

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helpful for us to dwell on Plaintiffs' Exhibit 7 except to the extent it may refresh Mr. Taylor's recollection. What I gather you are trying to bring out to me is that Mr. Taylor has said a good deal of dependence was placed on this audit in making up the exam.

MR. BALLER: That is correct.

THE COURT: And that the audit did certain things. Well, it did whatever it did. It's in here. I think we will get that from Exhibit 7. DKE

MR. BALLER: My point is but I think the exhibit shows the audit was not prepared as a study of the correction sergeant exam but as a study of various titles.

THE COURT: It seems to me what is important is actually contained in Exhibit E, not what its purpose was.

MR. BALLER: That is correct.

Q That is a big exhibit. I won't ask you to go through it now but could I ask you, if you have a copy, to go through it tonight and be able to tell us tomorrow how many times in that large package of documents the job of correction sergeant is mentioned and how much description there is of a sergeant's job in there? Would you be able to do that tonight?

A I would doubt it. I have scanned these documents. I would say that my recollection is that the sergeants

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usually were conducting -- there would usually be someone with the auditor, and there were sergeants mentioned in that connection, and they went around with the auditor, and the sergeant's position is described not in the same depth as the officer because --

Q The people who took the auditors around are not the ones who wrote the examination, are they?

A Of course not. They were the ones who talked to the auditors.

MRS. GORDON: Excuse me, your Honor. If this is meant to imply the auditors were also writing the examination, that is likewise incorrect.

MR. BALLER: The contrary.

THE COURT: I didn't hear any such indication to the Court.

Q Would you be able to go through that and just be able to let us know tomorrow exactly how much --

A You are asking me to go through this? I don't understand what you want me to do.

THE COURT: I don't understand why Mr. Taylor has to do it. If it is in here, it is in here.

MR. BALLER: I can't testify.

THE COURT: This will be in evidence. Nobody needs to testify. You can draw my attention to things or lack of

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things. If Mr. Siegal is going to testify, as I understand he is, wouldn't he have a pretty good grasp of this, or would he?

MR. BALLER: I am not sure.

THE WITNESS: Yes; he would. I am not sure I understand yet --

THE COURT: If Mr. Taylor can do this and do it conveniently, it would be a help. I don't mean it wouldn't. What Mr. Baller is trying to bring to my attention, Mr. Taylor, is to what extent this document, Defendants' Exhibit E. actually deals with correction sergeants, and if you can peruse it for that purpose, even if only in a general way, although the more specific the better, and give me the information that you find in it tomorrow, that would be a help.

THE WITNESS: I can.

MRS. GORDON: Your Honor, might I suggest that Mr. Baller's line of questioning would be best used with respect to Mr. Siegal, who is in fact the test constructor, and I would assume has read those materials?

THE COURT: I certainly don't want to tell Mr. Baller to ask who about what. He is entitled to call his witnesses about various things. I don't want to sound as if I am talking out of both sides of my mouth. If Mr. Taylor can do it, it would be a help. What we are asking him to do is to

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find things in these documents we should be able be able to do also. We are asking him to help us do it.

MR. BALLER: We will assist.

THE WITNESS: If I could make a point here, I would have to say that nearly every line in these audits refers to the duty of a sergeant. I have made a statement in the outline of the project that we discussed earlier that to my mind the meaningful frame of reference is the series 1, 2, 3.

Now, I also will say to Mr. Baller that my recollection from scanning is that the sergeant is mentioned in the audit of each facility to the extent perhaps that each post is mentioned, where they are. But the sergeant position -- the sergeant is a supervisor of the officers, and the skills and the knowledge of the sergeant are such as is required to supervise the officers in carrying out the activities that the audit seems to represent.

I believe Mr. Baller asked me to go through and find and perhaps make a red mark every time the words "correction sergeant" are mentioned, which it seems to me is fruitless.

Q Let me ask you a different question. All of those audits and reports and so on were made in the spring of 1970, weren't they?

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A Yes.

Q Do you know of any more recent inspections of the job or audits that were used in preparing the most recent sergeant examination?

MRS. GORDON: Could we have an indication by whom?

THE COURT: By anybody, I guess.

A You mean by a classification -- you mean at visits to facilities by Mr. Siegal?

Q Do you know of any more recent documentation that was used by the people who drew up the examination, other than those, documentation in the way of audits or inspections?

A No; I don't believe I personally know of any.

Q Do you know if the people who drew up the examination had a job description available to them when they were writing the examination?

THE COURT: Job description of the sergeant's job; is that right?

MR. BALLER: That's correct.

A This would be Mr. Siegal, Sperback, Ciuros?

Q Right. Did they have a written job description?

A You mean class specification?

Q My question is job description.

A I would have to assume so.

THE COURT: But you are just assuming.

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A (Continuing) I thought you were asking me if they had such and such a document, which you would show me. I think they were kind of living job descriptions. They were there.

Q You don't know whether they had a written job description?

A No; I don't know that.

Q If what they had was that job audit plus the K. S. & A. statements, Plaintiffs' Exhibit 8, plus the class specifications, Plaintiffs' Exhibit 4, plus the employee rule book you have referred to, Defendants' Exhibit O, would that constitute a job description to your satisfaction?

A Yes; in general, yes.

Q And as the principal responsible officer of the Civil Service Department, that would be an adequate basis for developing the examination, in your view?

A Yes. These audits were of such recency and so voluminous, and the reports on them were so cogent, and, of course, our advisors were themselves very good, that I would say that it would certainly be appropriate under the standards we are applying.

Q Do you understand the term "job analysis" to refer to anything other than job description?

A I hope I understand the term in many senses. Most importantly, as a series of operations or understandings,

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discussions by which you identify what people do and why and what can be tested and what should be tested. The process itself --

Q It is different from a job description?

A Yes. I think it is. That process cannot really be reduced to something called a job description.

Q Is it necessary to have a job analysis as opposed to a description in order to construct a valid test?

A It is necessary to have a process -- that is certainly true -- to identify what you are testing for.

Q Your testimony is, it is not necessary to have the job analysis itself, just the process?

A The job analysis is the process. What do you have in mind? There are various types of processes with more or less formality.

Q Read along with me in Plaintiffs' Exhibit 27 of the EEOC guidelines at page 2087, as we have it reproduced, Section 1607.5(a), where it talks about evidence of content or construct validity. It continues:

"However, evidence for content or the construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in case of job knowledge or proficiency tests for the construct) in the case of trait measures."

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Would you agree with that statement?

A Yes.

Q Is that consistent with what you have just said?

A Yes; it is.

Q So you don't interpret these guidelines as requiring anything in writing as long as you have a good process?

A This would be rather specific to the occasion, Mr. Baller. There is, of course, a great deal in writing here. Essentially, though, the forms are a poor model of the reality in any case, but it is certain some documentation must be made; for example, in one of your exhibits the sub-test description is a kind of documentation that is certainly relevant here.

Q I would like to go back to Plaintiffs' Exhibit 8, which maybe you have, because I don't. Do you have my copy? Here it is. That is a series of five K. S. & A. statements. Is that a fair description of it?

A No; it is more than that.

THE COURT: What is K. S. & A?

THE WITNESS: Knowledge, skill and ability.

Q That is a sub-test title description, then?

A It is a sub-test description describing the knowledge, skill and ability which was supposedly being tested here and a general description of how it is being tested here.

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Q For each of the five sub-tests, can you tell us who drew up the sub-test description which is contained in that document?

THE COURT: Isn't it up at the top of each one?

A The first three is members --

Q Could you indicate which sub-tests the first three are?

A Using good judgment in the correctional field, modern correctional methods and practices and laws, rules and regulations governing the administration of the Department of Correctional Services facilities.

Those were drawn up by the examiners, Mr. Siegal, Mrs. Walters and Mr. Bolton -- by the examiners who worked on this examination.

Q How about the other two?

A The other two were drawn up by examiners who have a responsibility for constructing test materials which tend to cut across occupational lines. K. Tang on one, and the other one -- this particular description is an old one. I don't know who, which individual person, made up this description. This is a heading for a couple of versions.

Q Was it made up in a section headed by Norma Kunofsky?

A Yes.

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Q Can you tell me how much contact there was between people in that section and the people who drew up the other three sub-test statements?

THE COURT: Would you know?

A In general, your Honor. They worked close by. But formalized contact -- these people submitted the sub-tests -- Well, these people were told what was wanted. They made it up and submitted it to the examiners, who had what we call primary responsibility for putting the examination together.

THE COURT: Would Mrs. Kunofsky and Mrs. Tang do that? They would hand it up and give it to the others?

THE WITNESS: Right. The examiner primarily responsible for this would look this over as against his frame of reference, and he would accept that or under a very unusual condition he might kick it back and discuss it or whatever. That's fairly unusual.

Q In this case, do you know if he accepted it?

A He did accept it, yes.

Q Did people from your section and people from Norma Kunofsky's section work together in the process of developing it or was it your section that ordered it and they produced it and handed it in?

A It was the latter.

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Q Can you tell me how much contact the people in Norma Kunofsky's section had with your Corrections Department consultants?

A I don't think they had any contact with them at this time.

THE COURT: What do you mean by "at this time"?

THE WITNESS: Obviously, I don't think they had any contact in this particular --

THE COURT: Examination?

THE WITNESS: Examination.

Q Do you know if they reviewed any of the documents relating to the correction sergeant job we have been discussing?

THE COURT: You mean Mrs. Kunofsky?

MR. BALLER: Right.

A I would expect they would have to review the class specification.

THE COURT: I take it that is based on your general experience and not your knowledge in this case?

THE WITNESS: Yes. The man who drew up the division sub-test I know has worked previously on some correctional examinations and was, at least in general, familiar with these titles.

THE COURT: You said "supervision". That was Mrs.

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Kunofsky or Mrs. Tang?

THE WITNESS: Mrs. Tang.

THE COURT: Which of the two were you referring to when you said "supervision"?

THE WITNESS: That is not in fact Mrs. Kunofsky. It is John Decker. Mrs. Kunofsky is in charge of the whole section. John Decker has this particular --

Q Would all these comments relating to Mrs. Kunofsky's section apply to the report preparation sub-tests as well as the supervision sub-tests?

A Yes.

Q You stated that Mrs. Kunofsky's section had some kind of a cross-functional role. Could you explain what that is?

A Well, in the interest of efficiency and actually to try to get better items, better sub-tests, certain knowledges and skills or abilities, as you will, occur across many occupational groups, one of thembeing report preparation. Aptitude testing, which has nothing to do in this case, also turns out to be of that type. A separate section was set up to concentrate on production of this material, which would be used by the other section. They would say, "Review the literature and discover items like report prep. They would try to figure out what is the important aspect of report

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preparation in this kind of a job or that kind of a job, and they would review the literature and find some item formats, or they would design item formats, and they would be subject to a review by people who have special expertise, like an advisory committee, like a police advisory committee reviews items of this type.

Then they set up a pattern. They say, "Items with this format, report prep, we will make many versions of this. This format has been subject to review, and for these kinds of jobs, which are like these jobs, and we will make 18 or 20 sub-tests like this, and we will use them in these two jobs, like a police examination or correction officer examination or some other examination of that type."

Q Are you indicating that those same formats for supervision and report preparation are used in the tests for a number of different job types?

A Those formats are, yes.

Q So they would be used for both correction officers and police officers?

A Report prep, definitely.

Q Are they used for other job types?

A They may well be, yes.

Q Do you know of any others?

A Offhand, no.

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EDWARD L. KIRKLAND, etc.

Plaintiffs, 73 Civ. 1548

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, etc.

Defendants.

New York, New York
July 25, 1973
10:00 A.M.

(Trial resumed.)

THE COURT: I see that you have switched positions. Does that mean the plaintiffs have rested?

MR. BALLER: No, but almost. Rather than change all these boxes in the middle, we did it at the beginning of the day.

S A M U E L T A Y L O R, resumed.

THE COURT: Be seated. I remind you you are under oath, although I don't think I have to remind you.

DIRECT EXAMINATION (CONTINUED)

BY MR. BALLER:

Q Mr. Taylor, at the end of yesterday's session we were discussing the report preparation and supervision sub tests specifically. In particular we were discussing the fact that they were prepared for cross occupational function not specifically related to the correction officer series.

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THE COURT: Can you give me the exhibit number?

MR. BALLER: I am directing Mr. Taylor's attention to Plaintiffs' Exhibit 8, the last two pages of that.

Q Are those the sub test descriptions for the report preparation and supervision sub tests?

THE COURT: The last two pages?

MR. BALLER: That's correct.

A Yes, these are the cover sheets for a number of these sub tests.

Q Down at the bottom under the heading "Appropriate for:" the report preparation sub test says "Entrance level investigative positions."

THE COURT: That is the next to last sheet?

MR. BALLER: Yes.

Q What other entrance level investigative positions would be included under that rubric?

A I don't know. I would have to look at the full file, I suppose.

Q Is the correction sergeant level an entrance level position?

A No, it is not.

THE COURT: I am confused because the next one says appropriate for grades 10 to 14. Is that a higher level than --

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THE WITNESS: These are usually the number of occupations. The examiners use -- they are not supposed to be part of the system. They are like guidelines. Sometimes if an item has a face content which sort of bears onto one matter or they don't want to -- say it is a labor foreman or something like that, it is not that kind of thing, they will put that down there. It is more a warning t[illegible] --

THE COURT: Well, that gives me a little illumination but not as much as I need since I am really in the dark on all this.

One of the things I find confusing is that these documents which are all put together and which apparently have something to do with this particular examination that we are talking about indicate on two separate sheets appropriate for what appear to be different grades.

Am I right?

THE WITNESS: Yes.

THE COURT: And so what is really being said is that although it is one exam it could be used for two different groups of people?

THE WITNESS: These sub tests, yes. These are cover sheets in a black looseleaf binder. They are a generic description and then I think on report prep we have about 18 or 20 sub tests with the same setup of questions, ten

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of this kind, five of another kind, and then they file -- each time they use it they file a printout they get from the computer behind this heading, and so on. That's how they use it. So they go in there and they will use this series and they will pick one out. Sometimes the examiners have codes on difficulty level and so on, but the main record I guess is the actual outputs that are filed behind this in the black looseleaf binder.

THE COURT: All right.

Q Let me clarify that. Is the correction sergeant job within grades 10 to 14?

A No, it is higher than that. It is 16, I believe.

Q Are there other jobs --

THE COURT: What about correction officer, do you know?

THE WITNESS: That is 14.

THE COURT: 14?

THE WITNESS: I believe so.

THE COURT: So neither of these sheets on its face indicates that the sub test is appropriate for a correction sergeant, is that correct?

THE WITNESS: No, it would not be. I say -- what is the word? -- these verbal statements are more warning they don't use for anything too remote from this because it

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might have something in there that will look very funny.

Q Let me ask you to keep those five sheets of Plaintiffs' Exhibit 8. Each sheet indicates there are to be 15 questions on the sub test, is that correct?

A Yes, that's correct.

Q So that the five sub tests have equal weight, is that correct?

A In that sense they all have the same number of questions; yes, they all have the same number of questions.

Q Do they have different weights in some sense?

A It would depend how "weight" was defined, Mr. Baller.

Q Is there some definition you can give us in which they would have different weights?

A Yes. There are several, as a matter of fact.

THE COURT: You could attribute more points to each question in a certain group if you wanted to. The question is if you do or you don't.

THE WITNESS: I could. We have provision in the sum for multiplying one by one, two, three, one and a half.

THE COURT: I don't see why we should deal with hypotheticals. Do you know whether there was any different weight between one and another of these sub tests?

THE WITNESS: Well, under the definition of "weight" we like to use or we sometimes use, and there are a number, you say weight could be considered how well the sub test

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correlates with the total score, in other words, how much it's like the total composite score, and you call that a weight.

There are others that have different definitions. The number of questions is not completely determinative of the weight.

THE COURT: Are you trying to inquire into the question whether the results of one sub test might be given more credit than another?

MR. BALLER: I would like to establish that on this test each question was one right or one wrong.

THE WITNESS: That is certainly the case, one point for the correct answer.

Q So that just in the literal sense of how many right or how many wrong, 20 per cent of the opportunities to get a right or wrong answer existed within each of the five sub tests, is that correct?

A I believe so.

Q Why did you decide to give the five sub tests equal, if I can use the term, weight, in my inexpert sense?

A Well, the usual determination -- if you have some kind of external criterion you can run some straightforward operation and you can come out with weights which best predict that criterion. If you don't it comes out to a

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matter of judgment between the people who are making up the examination, as you know.

Now, we have provision for assigning weights sometimes, but in general we find it does not affect the composite score. It is a principle that if various sub tests are related to one another, two or three or four different weighting patterns, two for this, three for that, unless you get actual reversal of the relative weights, they all come out with the same result on the composite.

So the text we use in general suggests that it is not worth bothering in terms of what result it has on the composite scores of the people, it is not worth weighting. I believe the sub test on the rules and regulations didn't have as many questions as the last time, which is a kind of weighting decision in a fairly straightforward elementary sense.

Q Did you make the judgment on this test that each of the five parts was equally important?

A I personally did not.

Q Do you know if anyone did?

A Well, I assume that the parties who were constructing the test did make it.

Q Did you inquire as to whether or not they made that decision?

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A No.

THE COURT: I take it you assume when they are assigned to that responsibility they will fulfill that responsibility, is that it?

THE WITNESS: I interpret that to mean have I asked them since -- well, at any time.

Q During or since.

A I assumed it essentially, especially when they did cut one sub test in terms of number of questions. It's a fairly crude way but it's fairly effective for that purpose.

Q But in terms of your general supervision of the test developed, you didn't specifically discuss that with your subordinates?

A No.

Q Do you know whether any of your Corrections Department consultants advised you that these five sub test areas were equally important to the job?

A I don't recall anybody sitting down and saying to me these five areas are equally important to the job. The thing is --

Q Do you know --

A Excuse me. I see things coming across my desk which say: Give this weight 2, weight 3, in the sense you

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mean, just multiply the score by two or three, or something like that, or have two sub tests of this type, and I assume a decision was consciously made, that they didn't pull this out of a random table. When I see the same weight, I assume the same decision was made.

Q Do you know whether in any of the recent past corrections sergeant examinations say going back to 1964 or '5 there had been any weighting of questions in the sense of multiplying right or wrong answers by two or three?

A I just don't know.

Q Did you review any of the prior sergeant's examinations?

A No, I did not.

Q Do you know if Mr. Siegal did?

A Yes, I believe we state that.

Q Do you know whether any questions which had previously been used for the sergeant's exams were reused for this test?

A It is my understanding that they were not.

Q Now, I believe you have described already how the passing score on this test was set at 70. I won't ask you to go over that again.

Could I just clarify that before the test was given there had been no decision whether the passing score would

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be 70 or 65 or 60 or 55 and depending on the results of the test you could have set it at any one of those levels? Would that be a correct statement?

A I am not sure I understand it. It would be very likely in the minds of the people working on it that they are looking for a certain difficulty level of material. They probably expect to set it at 70 per cent. They probably expected that to happen.

THE COURT: They didn't actually do it before the exam?

THE WITNESS: No, we don't normally do that. With rare exceptions, we don't.

THE COURT: You are using the passing mark device to acquire the number of people that you feel you need?

THE WITNESS: That is the main thrust of it. Sometimes we will bend that rule in cases where for some reason we want to have special recruitment, we want to get some people in and it is not critical. In a situation of this kind, though, they don't drop the pass point normally. They usually get what we need.

THE COURT: Isn't there a peril in dropping the pass point that you may take on unqualified people?

THE WITNESS: In this kind of a job, it certainly has to be considered a peril. It is more risky to have the

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wrong person than it would be risky to not have a person who might be right. These are rare, non-quantitative kinds of judgment.

Q I would like to direct your attention to the second page of Plaintiffs' Exhibit 13 in evidence under the heading labeled Section 52, Promotion Examination. I believe that is from the State Civil Service law.

MR. BALLER: Is that correct, Mrs. Gordon?

MRS. GORDON: I am pulling it out.

THE COURT: What page is that?

MR. BALLER: Second page of Exhibit 13.

THE COURT: And what reference?

MRS. GORDON: Section 52 of the Civil Service Law.

MR. BALLER: That is from the Civil Service Law of the State of New York.

MRS. GORDON: It appears to.

Q In paragraph 2 under Section 52 it says: "Factors in promotion. Promotion shall be based on merit and fitness as determined by examination, due weight being given to seniority. The previous training and experience of the candidates and performance ratings where available may be considered and given due weight as factors in determining the relative merit and fitness of candidates for promotion."

My question is, on this most recent sergeant's

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examination, do you know whether the previous training and experience of the candidates and performance ratings were given any weight as factors in determining fitness and merit?

A Only in the sense that people with unsatisfactory ratings were not admitted at all, as a normal practice. But you mean did they affect the man's rank on the eligible list?

Q That's right.

A No, this is not the case.

Q Did you give any thought to giving some points or credit for experience and ratings, and so on, just like you did for veteran's credits or seniority credits?

A I have given some thought to it, Mr. Baller. As you note in the federal grant request and description, we have thought about everything, just about, in this field. We have come to the satisfactory-unsatisfactory system from a more elaborate rating system. I think Mr. Ryder described how things get simpler all the time.

THE COURT: Some things. The law doesn't.

A (Continuing) But the performance ratings that we have been able to get would not meet the kind of standard we would apply to the test itself. We haven't used them. They do run into some employee resistance in many cases. So we go with straight seniority ratings, which has very good acceptance, and that's about what it is.

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You asked me did I think about it. At the officer level we have gathered personal vitae and we were thinking of doing it, and the Correction Department has something going in the same sense which we will have to get together on. We thought about it but we did not do anything in this instance about it.

THE COURT: I take it life with the unions is a lot simpler if you go by seniority, too, isn't it?

THE WITNESS: Your Honor, I just don't know yet. I think if the thing is well documented, the written test, we don't have too much trouble with the unions. It is so objective. I think it is subjectivity that will probably give us the trouble.

THE COURT: I mean when you eliminate seniority as a controlling factor you introduce a greater degree of subjectivity or the possibility of it.

THE WITNESS: Yes. You have to see how it works out.

THE COURT: All right.

Q I would like to ask you generally whether the purpose of the correction sergeant promotion examination was to predict which of the candidates would be likely to make the best or the most competent correction sergeants or whether the prupose was to measure their achievements in the

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job of correction officer or whether the purpose was to measure their then present knowledge of the job of correction sergeant.

Could you state which of those purposes comes closest to what you had in mind when you were supervising the development of this exam?

A They are all three purposes. They are purposes or means to that end. Of course, you always try to predict performance.

Q Would that have been the principal purpose of the examination?

A Well, certainly from the department's point of view and from our point of view any examination is certainly hopefully going to pick your best men. Of course, it is how you do that.

Q In Plaintiffs' Exhibit 26, which APA standards, I would like to show you a paragraph, a couple of paragraphs, on page 14, the first one at the bottom of the first column which says:

"For achievement tests content validity is usually of first importance."

And it goes on to describe that. I won't read through all of it. At the bottom of the second column it says:

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"For projective techniques construct validity is the most important, although criterion related validity use criteria collected either concurrently with the testing or afterwards may be pertinent if the instruments are to be used in making diagnostic classifications."

Would you agree with those statements?

A The one on the left side I would agree with.

THE COURT: The first statement?

THE WITNESS: Reserving the right to put it in context.

THE COURT: Don't you mean the first statement that was read to you?

THE WITNESS: The first statement, the left side column.

Yes, I would agree with that in general. The one on the right side --

Q That would be the second statement.

A The one on projective techniques. I see nothing I can put my finger on. I guess I would agree with it especially as it appears in here.

Q Examination 34944 was not an achievement test, was it?

A Yes, it was.

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Q What achievement were you trying to measure?

A Partly correction officer, how well the man knew the correction officer's job, on the idea that this would predict how well he would do a sergeant's, partly how well he knew things that the people who put this examination together thought were necessary to be a sergeant, especially the day you walk on the job. It looks both ways.

Q You could not measure the candidate's achievement as correction sergeant with the exception of those candidates who were provisionals at the time, could you?

A I doubt very much we could have done that with provisionals. It is extremely rare in corrections.

Q You didn't try to measure achievement as correction sergeant, did you?

A No.

Q Do you believe that the examination was content valid?

A Yes, I do.

Q Could you explain on what basis you make that statement?

A Well, Civil Service test -- the prime directive in Civil Service testing has always been job relatedness. Right? The whole idea of the system is to have practical job related examinations laid on us by the law, and every-

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thing we do is to support that. We have this process which again the whole point of it is to have these class specifications and these job audits and to have these scope conferences and to have these experts and to have the department clear all these conclusions and to have these experts help write the questions.

It seems to me the whole thrust of this is to make examinations job related. True? And this examiner went through that process. He went through that process maybe not the most complete but certainly not the sparsest record. He went through the process and made those judgments along the way. There was a consensus at each point. How else would you find content validity, Mr. Baller?

Q I am afraid I can't testify.

A I am sorry.

Q Is it the thrust of your testimony, Mr. Taylor, you believe the examination was content valid because it was developed under a process which is directed at producing content valid exams?

A Yes.

Q Are you not contending that the examination is shown content valid by some independent study as opposed to the process by which it was developed?

THE COURT: Mrs. Gordon, please don't shake your

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head.

MRS. GORDON: I am sorry.

A Independent study means not by us?

Q I don't mean independent as between in-house and out of house but as distinguished from the process itself of developing the exam.

In other words, did you take a fresh look at the exam at some point or did you just develop it according to the process which you believe is adequate?

A Basically, we developed it according to the process. After this action was brought, I did have some people go about it from a different route and sort of verify it to see if they could get a good match, if that is what you have in mind. I think you have seen some of that material.

Is that what you are driving at?

Q Do you know whether this process by which exam 34944 was developed is the same process that was used for the development of the last few previous correction sergeant exams?

A Well, in a sense I know that, yes.

Q In what sense?

A In the sense that this has been the process for many years, and I mean the division has exhorted people

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and gone through this kind of process as long as I have been here and in other areas. This is the first time that I have been at all close with the correction series in the State of New York.

Q Are you familiar with the term "criterion related validity" as it is used in the field?

A I believe so.

Q Do you contend that examination 34944 -- do you believe that that examination has been shown valid by criterion related validation?

A No, I don't.

Q Do you believe that it's been shown valid by a construct validity technique?

A Not essentially, although there are certain niceties of that but they are quite complicated.

Q Would you agree or disagree with the statement that it is generally more desirable to validate a predictive examination by a criterion related validation technique or a construct validation technique than by content validation?

A No, I would not, Mr. Baller. You can make a case for brutal empiricism. If you have a situation that is like a fire, you want to put it out, all right, but, in general, unless you have a fairly good notion that, say, your criterion is in fact job related, you know, as well

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constructed as your test, the content part is probably the prior one, the logically prior one, if you are going to do anything with it.

Q Let me ask you to look at Plaintiffs' Exhibit 27 on the page numbered 2087 in that reproduction of the EEOC guidelines at section 1607.5(a).

THE COURT: Will you wait for me, please? What exhibit?

MR. BALLER: Page 2087.

A The whole paragraph?

Q Yes. Now, that says in section (a):

"For the purpose of satisfying the requirements of this part." --

And let me interject that the part is headed "Minimum standards for validation.

-- "empirical evidence in support of a test validity must be based on studies employing generally accepted procedures for determining criterion related validity."

And then it refers to the APA standards. It goes on:

"Evidence of content or construct validity as defined in that publication" -- the APA standards -- "may also be appropriate where criterion related validity is not feasible."

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Would you say that that statement indicates the EEOC guidelines at least have a preference for criterion related type validation?

A In a sense.

Q And it is your testimony that you just don't agree with the guidelines on that point?

A Of course not. On the EEOC guidelines, when they first came out, of course we looked at them rather closely, what are they saying. It is my contention they are preferring completeness. They are preferring completeness.

Q What do you mean by completeness in that sense?

A That you hold your process up to as many and as rigorous standards for demonstration as you can.

Now, Civil Service has also considered that content -- job relatedness is primary, and then you do other studies, you do other methods, too, as you can, as feasible, as they say.

So we don't consider this as being anything startling from our point of view. I believe I wrote something on this. It should require us to perhaps apply a standard of feasibility, a kind of input, payoff kind of thing that might be a little bit more loose than we had in the past, but they are not preferring one against the other against a third, they are preferring completeness, everything.

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Q You only attempted one form of validation, and your testimony is that the examination has only been shown valid by one technique, namely, content validation, in terms of reliance on the process by which the exam was developed.

Is that a complete kind of validation given the existence of three separate techniques?

A There are schools of thought on that. I personally feel that -- especially in Civil Service, where you have these occupational series and you come back in two years, three years, they are all in cycle -- at any given point of time you may be applying any of these techniques.

I am sorry, Mr. Baller. I think I may have lost the thrust of your question trying to get my head together.

Q Has the department, so far as you know, with reference to the correction officer series ever attempted a criterion related or empirical validation study? Let's exclude the methods project now under way and not complete.

A I think a long time ago, quite a few years. '41 and then '61 there were.

Q Do you know what jobs they were on?

THE COURT: What kind of tests or studies were they you are talking about?

THE WITNESS: They purported to be criterion

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studies. There was a great deal of discussion on what we would not consider item statistics and test statistics. I think there was considerably more looseness in the whole approach in those days than there has come to be over the years.

You exclude the project. It is hard to say what is the project and what is not. We did attempt to put together a performance rating criterion measure for officer in the spring.

Q Spring of what year?

A '72. But we consider that we weren't successful. We had two people rate a number of people on what we thought were appropriate elements, and we couldn't get agreement, and so the performance rating we thought was unsatisfactory, that we would not be able to validate the officer at that point.

Then the grant came along and --

THE COURT: Am I to understand that whatever you did at that time did not find its way into the construction of 349447

THE WITNESS: Except in the sense that we had a pretty good idea as to feasibility of getting a good, say, criterion measure or something like that.

In other words, the work we had gone through gave

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us a pretty good idea as to what records were available and what kind of ratings we might be able to get.

Again, the operations of the officer and the sergeant, they are post positions, so the sergeant supervises what the officer does. His function is to be in place and look and see.

So we figured that the ratings for officer would be at least as good as we could get with anything else.

Then we had the federal grant and we had the notion we would -- well, the whole thrust of that is can we do this, and we are working on it now.

Q Mr. Taylor, in the passage from the EEOC guidelines that I read a few minutes ago, which I think you differed with slightly, the guidelines state the content or construct validity can be used where criterion related validity is not feasible.

Do you understand the use of the word "feasible" in that context?

A I think so.

Q My question is --

A I am sorry.

Q You have answered the question.

My next question is, do you consider that a criterion related validation would be feasible in the case

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of tests for the correction sergeant job?

A This is to be determined. This is the thrust of the grant. It is supposed to run over two years. If you are asking for my opinion at this time, I think it will be. I think we will be able to do it.

But I certainly couldn't demonstrate that opinion. There are people who don't think we can do it and, in fact, who don't think you can do it in Civil Service context in general; but I am hoping you can do it.

Q When was this research methods project initiated?

A That would be towards the first part of '72, I think, we started putting that together.

Q Was that the proposal or the project?

A The proposal.

Q When did the project itself start?

A Well, around August 1st, I think, or somewhere in August I would say we started getting moving. There was some prior activity around the corrections series.

Q In August, 1972, that would be well along in the process of developing examination 34944, wouldn't it?

A Oh, yes. The job audits were long past and there were a number of visits.

What I am saying, Mr. Ball[illegible], is that for another purpose, not completely connected with the project, although

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the project in some way grew out of this, we were very interested in the selection of officers of picked the officers back in the early part of the year, too, and we had several people assigned to consider various ways we could select officers.

Q Before these inquiries about the feasibility of criterion related validation that you have just mentioned, were there any other attempts that you know of by the Corrections Department or the Civil Service Department with reference to corrections jobs to see whether thattype of validation would be feasible?

A I don't think there were. I am not positive but I don't think there were.

Q Let me direct your attention to part of Plaintiffs' Exhibit 2, which are answers by the defendants to plaintiffs' first interrogatories, on page 15, item number 38. Let's get exactly what that interrogatory was in Plaintiffs' Exhibit 1.

THE COURT: Page 2, did you say?

MR. BALLER: Page 15.

Q Item 38(d) says:

"For those persons" -- I am reading the interrogatory -- "For those persons" -- and the reference is to Black and Hispanic provisional officers --

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"state the basis on which the recommendation for appointment as a provisional sergeant was made, including work record, seniority, etc."

The answer in the middle of that paragraph is:

"The bases for recommendations for provisional appointment to correction sergeant generally are:

"1. Ability as an officer.

"2. Evaluations from the superintendent and supervisory personnel.

"3. Ability to provide leadership and empathy to inmate population."

With regard to those three factors, can you tell us which, if any, you were attempting to measure by examination 34944?

A 1 and 3.

Q How did you measure number 3, ability to provide leadership and empathy? Which part of the examination was directed at that?

A Certainly the numbered parts, the judgment, the supervisory, the standard practices. You would have to say the thrust of them is to favor a certain kind of approach to correction, a rehabilitative approach. I assume this is one of the purposes of the department in this kind of examination. The body of all of the material

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seems to support that.

Q Did you not all try to measure number 2 in the examination, that is, the evaluation from superintendent and supervisory personnel?

A No, we did not.

THE COURT: I don't understand how one can measure an evaluation by an examination of the evaluee, so to speak.

MR. BALLER: I believe that is the point, your Honor. My point is it was not attempted to be measured in the written examination.

THE WITNESS: I don't follow that. I don't understand that.

MR. BALLER: Judge Lasker asked how could you examine the evaluation --

THE COURT: You could ask the testee, or whatever you call the person taking the test, what kind of an evaludation did you get, but what's the use? You have the evaluation.

Q So your testimony is that at least with respect to number 2, one of the main bases for recommendation for provisional appointment to the sergeant job was not even considered in the process leading to permanent appointments?

A Right.

Q Now, about number 3, let me hand you a copy of -

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the examination in two parts, Plaintiffs' Exhibits 18 and 19, and ask you to tell me which questions specifically measure the ability to provide leadership and empathy to the inmate population. If you could just take a ~~limit~~ ruler, let me clear the desk in front of you.

THE COURT: What exhibit are we back to?

MR. BALLER: 18 and 19, the test itself.

THE COURT: Ladies and gentlemen, I want to tell you that at five minutes of eleven I am going to have to break for about twenty minutes. There is a group of law associates coming to visit today and visiting various judges, and I have to see them in my chambers briefly.

MRS. GORDON: Your Honor, if I could just inquire. I think plaintiff is a little overtime on his half of the case. I would like to at least be able -- in fact, I must by Wednesday be able to start, I thought by 11:00 o'clock today. I see that is not going to be possible especially if Mr. Taylor goes through the entire exam.

THE COURT: I will have time to go over to Monday if we need Monday.

MRS. GORDON: O.K.

THE COURT: We are back to Exhibits 18 and 19, right?

MR. BALLER: Right. Perhaps we can curtail this.

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It will take Mr. Taylor some time. I can withdraw the question and if Mrs. Gordon and Mr. Taylor want to point something out they can do it on the defendants' case. I can withdraw the question.

THE COURT: I don't see it makes much difference who asks the question.

MR. BALLER: It will take Mr. Taylor time if he has to look at it on the stand.

MRS. GORDON: That type of examination is part of the defendants' case.

MR. BALLER: We can strike the question, if you prefer.

Q Let me just direct your attention to question 18 in Plaintiffs' Exhibit 18. The question reads:

"If a rule is unpopular with the inmates the supervisor should"

And the key answer, A, is:

"Consistently enforce the rule regardless of its unpopularity."

Do you think that kind of question measures the leadership and empathy ability of a candidate? The answer is shown in Plaintiffs' Exhibit 20, the key.

The answer is:

"Consistently enforce the rule regardless of its

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upopularity."

Q That is right, that is what the key says.

THE COURT: That is what the answer is?

MR. BALLER: Right.

THE WITNESS: I am not a corrections expert, as you know.

Q Does it strike you --

A In general, I think consistent enforcement of rules in an institutional setting is a kind of general panacea. It is generally considered to be a solid principle to follow. Empathy --

Q That is what it says in your answers to interrogatories as the basis for appointing provisional sergeants?

A Yes, that is correct. Empathy is a strange word. You mean sympathy or what? I am not quite sure.

Q The word is in your examination, Mr. Taylor.

A I don't know what is implied there.

THE COURT: It means sensitive to the feelings of someone in a different position.

THE WITNESS: And to the situation you are in and the consequences of what might happen.

I am not a corrections expert but in an institutional setting, especially of this kind, it sounds like a pretty reasonable answer to me.

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Q With reference to this method study -- I just have a few final questions -- in your proposal for a grant from the federal government -- you did propose to get some money from the federal government, didn't you?

A Yes, we did.

Q -- did your proposal state why you wished to undertake the study?

A Yes, it did.

Q What was the reason you gave to the federal government?

A It is fairly complex. I will try to make it sure. The point was that the electronic data processing technology has had some remarkable progress over the last couple of years in terms of the size of files that are economical, that you can own, and the speed of processing, the huge ability to hold it. This is just in the last couple of years, especially the programs to support these pieces of hardware.

We wanted to see how far we could run with that. We had been training and our people have been doing a lot of training up to the state university. I think you probably have some of their vitae and you can probably see that.

Of course, in-house training is what really counts. And again, they acquired a number of concepts, a

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number of approaches, a certain competence level. Then we had this reorganization controversy, in other words, what is the best way to organize to accomplish this kind of a program. All these things came together -- and then the Inter-governmental Personnel Act that had money and all these things came together.

THE COURT: Now they all came together. What did you tell the government it was you wanted to study?

THE WITNESS: I told the government I wanted to study how far we could go with this EDP technology, how clever we might have become in analyzing test data and in constructing devices -- not necessarily all written tests, by the way -- how this kind of organization structure might be a better one than the traditional one, and we told them that's what we wanted the money for and they gave us the money.

Q Did your proposal include as one of its reasons that you might be able to develop a better test for corrections officers series personnel?

A Yes, it certainly did. That would be the proof --

THE COURT: Did it specify corrections officers?

THE WITNESS: Actually we prepared three proposals.

THE COURT: I don't care about how many proposals you prepared, Mr. Taylor. In any proposal to the federal

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government in this business we are talking about, did you specify to them that you wanted money to see whether you could improve the tests for correction officers?

THE WITNESS: What we essentially specified to them is that correction officer and sergeant and lieutenant, and I call that a meaningful frame of reference, is the area where we will make the demonstration.

THE COURT: O.K.

THE WITNESS: The thrust of the project is method logical, feasibility, that kind of thing.

Q You also stated that your proposal indicated it would study selection techniques not necessarily all written tests.

What other techniques were mentioned in the proposal as worthy of study?

A We had been acquiring vitae on candidates -- questionairres on backgrounds and things like that on officer candidates for a while now, and we are going to see if this has any kind of predictive power against training criteria and subsequently against performance on the job criterion.

We are also considering oral tests like the counseling function. If you look at the audits and the reports on the audits, you see the increasing prominence of the small group operation.

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We are considering the possible use of something called group oral, where you bring a number of people into a room and it is a kind of simulation of a small group process. We have considered things like that for screening out, MMPI, things like that, mostly, though, for screening out.

I don't see how we are going to be able to use them for screen-in. In terms of non-written tests those I think are the three main areas: personal data on the man and its relation; the simulation oral kind of techniques; and possibly some personality appraisals, but more for screen-out. At least the way I see it, more for screen-out.

Q Do you have a copy of your proposal or proposals?

A I am sure we do. I don't have it in my hands but I know you have one.

Q Your counsel has objected to providing it previously. It may or may not be here.

A I just don't know. I think you have one.

MRS. GORDON: Your Honor, the plaintiff asked me to have available in the courtroom a copy of the proposal that we made to the government. I have such a copy. I previously during the course of the discovery objected to the production of this document on the grounds that it really was not germane to 34944.

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The witness has already testified that 34944 was not intended to be criterion validated within the structure of this project. Now we have had a lot of cross examination or a lot of examination in this area, and I have let it go by thinking that the court would want to have the context in which this project was operating.

If the court wishes, certainly I will give the document to the court or to the plaintiffs. However, I think we have now ranged pretty far from 34944, which is germane here. I don't see how the project request would make -- it would only elaborate further the examination which I think has already been quite extensive.

THE COURT: I don't wish to deal with any more paper than I have had bestowed upon me. On the other hand, if I can get any illumination from anything, I think I ought to have it. It does sound to me as if I might understand something from the proposal. If I don't, there is no harm in it. If I do, it is all to the good. So I will ask you to produce it.

I will have to declare a recess now until approximately -- will you stand by a quarter after eleven. I will be back here as soon as I possibly can.

(Recess.)

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MR. BALLER: I have asked the clerk to mark the grant proposal we have just been discussing Plaintiffs' Exhibit 42 and, when marked, I offer it in evidence.

MRS. GORDON: No objection, your Honor.

THE COURT: Received in evidence.

xxx (Plaintiffs' Exhibit 42 was received in evidence.)

MR. BALLER: No further questions of Mr. Taylor.

THE COURT: Thank you, Mr. Baller. Mrs. Gordon.

MRS. GORDON: It appears we only have one copy of this document. I am sorry for the inconvenience.

THE COURT: It's all right. Is it very voluminous?

MRS. GORDON: No.

THE COURT: I assume you will have copies made in due course.

MRS. GORDON: Surely. Plaintiffs' counsel has volunteered.

CROSS EXAMINATION

BY MRS. GORDON:

Q Mr. Taylor, in the interest of time, I am going to try to be as brief as possible. I just want to highlight a few areas which we discussed.

Could you just tell us prior to the time you came to the State Civil Service Department, just briefly state

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what experience you had in the testing field or in the Civil Service field.

A Five years with the City of Philadelphia personnel department as head of an examination section dealing with certain assigned occupational areas, most particularly police, fire, corrections, engineering, youth center supervisors. This is a kind of young offender facility.

You want me to go through --

Q Did you work in any --

A Do you want what I did there?

Q No. Did you work in any other civil service jurisdiction?

A Prior to that I worked in the City of Wyandot, Michigan, as personnel director and assistant to the mayor. I was responsible for dealing with the employee organization. It was a one-man operation. Also sitting in for the mayor wherever I could.

Q Is that mayor, m -a-y-o-r?

A Yes, the mayor. Before that, about three -- somewhat over three years with the City of Milwaukee, Wisconcin, time equally divided, I would think, between classification division and examinations division. This was my first job in personnel work, in the City of Milwaukee.

Q How long have you been with the State of New York?

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A Ten, eleven years.

Q What types of positions have you held with the State of New York -- excuse me -- with the Department of Civil Service?

A In New York?

Yes.

A I came as associate personnel examiner and I became a principal personnel examiner and finally chief personnel examiner.

Q Have you had supervisory responsibilities throughout your career with the State of New York?

A Yes.

Q Have you had experience in both classification and compensation, as itb called, in the civil service profession and in test construction?

A Yes, but rather far back on that classification in Milwaukee.

THE COURT: You have been basically a testing man?

THE WITNESS: Yes, but in the City of Philadelphia we got into some classification matters, too.

Q Approximately how many examinations does the New York State Department of Civil Service conduct in a year?

A Well, we run a state and a local program. We

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probably run about a thousand state programs and several thousand locals. But what that means, there may be one examination for ten or twelve different places, different locations in the state, but it would be, say, the one examination. But several thousand by place, but about a thousand in the state which would be by series of exam.

Q Counsel asked you on his direct examination -- our roles are reversed here at this point in the trial -- whether or not 34944 was intended to get at empathy.

Is it the position of the Department of Civil Service that 34944 is some type of personality test that is supposed to determine whether or not an individual is empathetic?

A No, of course not. The word is rather loose.

Q In what sense, if at all, do you mean that 34944 gets at empathy, that is, if you think it does?

A In the sense that many questions, if I recall, deal with situations where there is an alternative available, and you are testing whether a man knows what the department feels and what the people in the field feel to be correct behavior that he should carry out. It is usually what you should do in such and such a case or what is the important thing going on. The main thrust of the exam was to get the man into the situation so he is more aware

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of more variables than straight security, straight custody. The word "empathy" is rather loose, but we are trying to test whether a man knows what behavior is appropriate as far as the department feels, correction books and things of that kind.

Q Do you know whether or not there are any personality tests which go to areas such as empathy, motivation, diligence which have been --

THE COURT: What was the last word?

Q Do you know if there are any personality types of tests which go to diligence, empathy, motivation, those types of ideas which have been validated on a criterion model in the corrections context?

A Not to my knowledge, no.

Q Now, I drew from your testimony, and, of course, I am aware that you and some people who work for you are engaged in a criterion validity method study up in Albany now which pertains to the correction officer series, as you outlined. Counsel asked you on direct examination whether you believe it was feasible to criterion validate such examination.

Now I want to ask you whether or not feasibility is the premise of the study or is that a conclusion you have already reached?

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A It is the premise. There is a considerable body of opinion that I have been subjected to that is not, but it's a premise. It's a thesis. You state a thesis and you go down to Washington and defend the thesis and they give you money.

Q Is it your personal opinion now, notwithstanding whatever the other opinion in the field might be, that as of this time it's going to be possible to criterion validate civil service examinations? Is that your personal opinion?

A Yes, it is, for a place and a time. In some cases, yes; in some cases, no.

Q Are you aware of whether or not there is any --

THE COURT: In some cases, yes; in some cases, no. I take it you include the corrections field in the yes, is that right?

THE WITNESS: I hope so. That's the thesis of the grant that we will find out.

Q Are you aware of whether or not there is any opinion in the civil service testing field on the appropriateness of using criterion validation model as a method of validating civil service examinations? Is the field unanimous or is there a dispute of opinion?

A There seems to be a dispute.

Q Do you know what the position of the federal

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government is in this area?

A In general, they hold a position which is also held by many articles and different people you speak to in the course of your work that for content -- in terms of job relation and content it's irrelevant, it's not really in the same game at all.

THE COURT: As what?

THE WITNESS: Well, the criterion, the notion of validation by criterion, is not really even in the same frame of reference as the content. People use content valid -- they say content valid or job related -- tests as measures, you see. All these things are measures. Performance ratings are measures. They use these things and then validate other things against them as criteria. They say it has nothing to do with it. I say there is a considerable body of opinion that these are really two different things altogether.

MR. BALLER: I would like to impose an objection which is not to prevent Mr. Taylor from answering. The federal government is a many-headed body.

THE COURT: When you speak of the federal government in your recent remark, what part of the federal government were you referring to?

THE WITNESS: I meant the United States Civil

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Service Commission and their staff of advisers and experts.

Q Do you know Dr. Kenneth Millard who is an employee of the United States Civil Service Commission, Bureau of Standards and Appeals, and also has a related duty to the United States Civil Service Commission?

A Yes, I do know him.

Q Have you had discussions with him with respect to the view of the United States Civil Service Commission in this regard?

A Yes. He was probably the main one there when I had to go down to Washington and defend this thesis, and he was there. He was probably the main one.

Q Do you know whether or not --

THE COURT: What's his position, did you say?

THE WITNESS: He is head of the standards group there. I couldn't give you the exact title. It's changed since I have known him. He was with HEW at one time. He was in the research field basically.

Q Do you know whether or not the United States Civil Service Commission is presently operating on a criterion model with respect to its promotion examination?

THE COURT: For whom? For all its examinations?

Q For promotional examinations in, let's say, the security forces.

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A No, I don't think they are. No, I don't think so.

Q I have just asked you your personal opinion in terms of the feasibility of criterion validation as of this time. Would you please tell the court whether or not you believe that criterion validation was feasible -- at what point in time you came to believe that criterion validation was feasible or might be feasible for exams like the correction officer series and why, if you believe it, it was not feasible prior to that time?

A It's hard to put a date on when you start to hold a thesis that is contrary to most people's thesis. I would say it is several years since I reached that conclusion. It's been discussed in our own operation, of course, for some time.

I believe bearing directly on correction you would have to say it would be the first of '72, right around when I was preparing this grant, that I thought it might be feasible.

Q What development, if any, had taken place which led you to your opinion that criterion validation would be feasible, at least on a study basis?

A The big computer, the better staff, the better trained staff and some other work that we had done which produced pretty solid relations between subject matter tests

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of this kind and performance ratings or, on the other hand, the not so proud. Certain evidence when we had a hard job. Corrections is not a hard job.

THE COURT: To be sure I am right about this, criterion validation is that validation which relates to performance on the job to the performance on the test, is that right?

A THE WITNESS: Yes, that is so.

Q For everybody's clarification, in a criterion model, is that correlation or lack of correlation between perform ce on the test and performance on the job established through some type of mathematical relationship or statistical relationship?

A It is established on a logical relationship and then it is demonstrated in a mathematical way. If you don't have a sensible sounding thesis --

THE COURT: I take it if you found a lot of people were doing a good job in a particular category and they had done well on the test, you find there was some degree of relatedness; if you found a lot of people were doing a poor job but they had done well on the job, you would question it.

THE WITNESS: Some people support the position as long as you have the arithmetic relation, that's enough,

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it's O.K. It's not enough, but it's O.K., you go with it. First you state it logically and why this is going on, if possible, then you demonstrate that. Then you can go on. You can build on that. You can go somewhere.

The other way you put out fires. If you have a training course and everybody is failing, you put out a fire, but it doesn't go very far.

Q From your prior statements, and I have certainly noticed from your program -- pardon me -- your proposal, references to content validity and, of course, to criterion validity, just to clarify it, is one the substitute for the other.

In what role do you see these two forms, if we may say, of validity?

A One is the foundation for the other. The content in a job sense, where you are picking people for jobs. The one is the foundation on which you can do the other. If you don't have the task pretty well defined, if you don't have a good consensus as to what it means, you have very little chance of demonstrating any serious relation between it and the test.

Of course, the test is not one piece or one long strip. It has certainly internal divisions and they are supposed to predict somewhat different things. The job is

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not a molar kind of thing, is not just one task. It has many, many tasks. You have to find things that are common. Those are what you want to predict one at a time. Sometimes they don't go together. Sometimes a man is good at one part of a job and terrible at another. Sometimes another man is another. Then these two things cancel out.

The content or the job relatedness and the ability for performance rating, for supervisors to recognize what you are talking about in that rating scale is basic, is foundation for everything else.

Q Prior to the commencement or the actual working of this project, were there in existence so-called satisfactory or unsatisfactory performance ratings for officers, sergeants and what have you in the correction officer series?

A Yes, there has to be such a rating.

Q In your opinion, could such ratings, the satisfactory-unsatisfactory performance ratings, be used as a basis for measure on a criterion validity model?

A No. I think it was said earlier here that things get simpler all the time. You have to have one to get your increments, your salary increments. Just about everybody gets satisfactory. They are global, obviously, satisfactory and unsatisfactory, and most of the time they are just typed up in a list and you sign one for three or four people.

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No, you couldn't do it.

Q Is it a simple task to define the criterion or criteria that are necessary to demonstrate criterion validation?

A No. In general a test is a measure and criterion is a measure. It will take longer to do the criterion than to do the test.

Q Have you and your group made efforts to establish a criterion or criteria for officers in the correction officer series?

A We made one effort, yes.

Q Have you to date reached any stage where you feel you have a professionally acceptable either set of criteria or a criterion?

A No.

Q Are you continuing your efforts in that direction?

A Yes, we are.

Q I take it from that you also -- do you also believe at this time that you don't have a professionally acceptable criteria or criterion for the sergeant level?

A Yes. We are starting on the officer. We intend to focus on the officer at this point.

Q But you don't have one for sergeant?

A It's true, we do not, although there will be an

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extensive carry-over.

Q By the way, either in terms of structure or in terms of operation, when you start a study like this, what's the title you believe it appropriate to focus on first?

A This would vary now. In this particular case, I think the officer is the starting point. There are more of them. They are the ones working closely, having the various activities. I think the officer is the one to focus on.

Q Is the type of examination given for the officer level presently the same type of examination that is given for the sergeant level?

A No.

THE COURT: What do you mean by the same type?

Q You indicatedpreviously that the sergeant examination has achievement test aspects. Does the officer level examination have the same achievement test aspects or is it more an aptitude test situation?

A Well, you test for very pervasive achievement, let's put it that way, achievements which have not been made in the Corrections Department, things which are knowledges, skills, abilities, what have you, that have been acquired as part of your acculturation process.

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Q In the course of your proposal to the federal government, you mention validity obviously in several contexts. We will certainly let the court read the exhibit itself.

Was it your position at the time you wrote this proposal, which was submitted 3/28/72, that examinations being generated by the department in the correction officer series were not content validated as of that time?

A No, it wasn't. The proposal is essentially a methods proposal. It has to do with organizational structures, data processing capabilities, statistical operations.

Q What I am asking you is was it your belief --

A The idea is it would be possible to demonstrate in another way, an additional way, however you want to put it, the efficacy of examinations.

Q I take it if you found as a result of the study there was some inefficacy, in other words, some defect in the examination process, that you would change it as a result of what you had shown in your study?

A I certainly would if the data could be interpreted to indicate what direction the change should make. We certainly would, of course.

Q Do you have any information as of today either from your study or otherwise that there are defects in

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the examination process such as the one that generated 34944 that would lead you to change that examination?

A I have no knowledge of defects in the process. It would be ludicrous to pretend there are none, little ones here and there, but in the main thrust, no. It is a standard civil service process, and it seems to have been executed here in a reasonable way.

Q I just want to get clear, because, again, there are several references to validity in your discussion here in the proposal, whether or not in your opinion as of the time you wrote the proposal in '72 you believed -- whether or not you believed that the examinations in the correction officer series were content valid.

A Organizationally, I would say yes. My personal opinion I had not reached. I knew they were in the process--getting ready to start the process of another examination which would be held in the near future. Of course, this process was going to be followed. So I would just assume that barring accident on the way it would end up being job relevant.

Q Is it your opinion that examination 34944 is content valid?

A Yes, it is.

Q I just want to call your attention to one portion

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of the exhibit, page 4, I believe it's the second paragraph.

THE COURT: Is this Exhibit 42?

MRS. GORDON: It is Exhibit 42, your Honor. I am just trying to get the paragraph.

I am sorry, your Honor. Here it is. I am sorry.

Q Page 3, second paragraph. I will read it. The paragraph says:

"In the fall of 1971 our system had matured to the point that we undertook a program to routinely evaluate the predictive validity of our selection method."

Now I ask you, Mr. Taylor, in the fall of 1971 did you have any way of routinely evaluating the validity of correction officer series examinations on a criterion model?

A No, we did not. The statement says we undertook a program to do that. The statement there is a kind of chest thumping on the data processing system, that we have a data processing system capable of supporting such a thing.

As I described earlier with the various reasons, No, it could not be deduced from that that we could do this for the correction series. In fact, I had a feeling --

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that is implicit in there -- that we could not and it would take us a long time and a lot of money to see if we could.

Q At what time did your data processing capacity approach the level of being useful in terms of a criterion model study?

A That's a little simple, but in terms of a practice of our magnitude and in terms of who is going to have to execute it, I would say the fall of '71 is a little optimistic.

Q When did you reach that level so it became useful?

A Around that time, the first part of '72. The data processing at least was in shape.

Q When was the data processing in some kind of shape so you could actually use it?

A These are computer programs. O.K. Around the first part of the year.

THE COURT: First of what?

THE WITNESS: The first part of '72. It is still developing. We are still adding various kinds of analysis and improving the flexibility of the data system. It's strictly a data processing thing.

Q At what point in time, in terms of your data processing system, did you have ethnic data in that system

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in any usable form?

A Well, for the correction people that really did not occur until after the examination.

Q You mean after 34944?

A It just began a few weeks ago -- the program is going to be undertaken -- to acquire ethnic data on a man by man basis for the state employes. I believe that is a program. They are going to try it. This is not me. Someone else is going to try that.

Q In generating the ethnic data that we have used in this litigation, did Civil Service have some problem in trying to determine whether it had accurate data for use in this case?

A Yes. We have been depending upon voluntarily supplied ethnic identification from candidates, and in this case because we want to have more accuracy, the Corrections Department gave us more complete data. We did find what we expected, that some of our voluntarily supplied data was not in fact correct. But the first time we had complete data was -- it was after this case started because that is the basis on which I was able to get approval to get that data.

THE COURT: You said after the examination. You mean after the case started also?

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THE WITNESS: After the case started, yes; that was the basis for my being able to get that.

Q You had some ethnic data before the case started. I am asking you the question of accurate and usable data.

A Voluntarily supplied, yes, by the candidates.

Q I have one further question.

Does the study, the criterion study, that you are presently engaged in have as part of it differential validation as well as criterion related validation?

A Yes, it does.

Q So the court may know, what does differential validation pertain to?

A The thesis that a given selection measurement may not produce the same level of predictive accuracy for groups defined in various ways. The most obvious one and the relevant one here is ethnicity. They could be defined in other ways, by sex, for example. This is the thesis. So you try to get a measure of the job performance in a standard criterion way and then you take the test measures.

Then it gets a little complicated there. There are several interpretaions of what is differential validity. Essentially I think the one we are using is that -- what I am holding at the moment has to do with equal achievement, equal level on the performance measure is the main thing

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you relate to and then you, in ranges, relate the test scores to that. You equalize at that point in ranges.

Q I am assuming that the concern about differential validation in the correction officer series, at least as you have outlined it, is one of ethnicity as opposed to sex. Is that correct?

A Yes, it is.

Q Do you consider it an important aspect of your criterion study to include the question of ethnic differential validation?

A Yes, I do; yes.

Q And that is one of the purposes of the study?

A Yes, I believe it is stated explicity.

MRS. GORDON: I think that is all, your Honor.

MR. BALLER: I have a few questions.

MRS. GORDON: I am sorry. There was one other question.

BY MRS. GORDON:

Q I noticed, Mr. Taylor, there is a sectionof this document starting with page 7 following -- I don't have the final page of the exhibit -- page 7 at least through page 10 outlining chronologically certain goals, I take it, for the accomplishment of elements in the project.

Just tell me, Mr. Taylor, have the time goals

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in this project been met?

THE COURT: Is this Plaintiffs' Exhibit 42?

MRS. GORDON: Yes.

A It has gotten somewhat scrambled. Some of the expected things have come along pretty well. Others have not. There are other things that absolutely must be done, and it turns out people involved in this project, in this examination, have stolen time in a way that I didn't anticipate, but it is behind schedule, especially in the area of criterion development validation, which is a critical one. I propose to pay back with other staff at the appropriate time, if possible.

Q You mean you are going to take the staff -- strike that.

One other thing I would like to ask you about. At least on page 7 and I am sure in other places in this document there are references to job analysis of sample positions. In order to establish the criterion or criteria for a criterion validation study, would it be necessary, in your opinion, to go back to the job to do job analysis or job investigation for the purpose of setting up the criteria?

A Oh, yes.

Q Would this be something in addition to or other

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than the type of job analysis or investigation of the position that one might do in a content validation situation or, if it's the same or divergent, would you tell me where it is the same and where it diverges?

A It is very similar. Job analysis is a word which is more impressive than in fact it is. It is a series of operations. The difference would be largely in the standard of proof, in other words, how you are going to demonstrate that this is how it works. In one case you demonstrate that you did carry out the process and you got a consensus.

In the sense we are talking about where you have a criterion, the criterion produces numbers and these are amenable to other standards of demonstration.

Q Notwithstanding the --

A Excuse me.

Q Notwithstanding the kinds of materials you had before you in terms of generating a content valid examination such as 34944, is it necessary in terms of the criterion methods project to go back to the job to either establish or validate the criteria or criterion involved in the project, at least in the context you are operating?

A I think it is. The process never ends, especially in a case like this where there are a lot of people who

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question whether it is feasible at all. It would have to be pretty cogent when it is finished to convince anyone. So I think there would have to be more looks, more audits, considerably more discussion and testing out.

Q Just so we may have it clear, as I recall it, your prior testimony was as of that date you have not yet developed a professionally acceptable set of criteria for correction sergeant, is that correct?

A No. That is correct.

Q Yes, it is correct?

A Yes, it is correct that we do not have a criterion that we could use for correction sergeant.

MRS. GORDON: Thank you very much, Mr. Taylor.

REDIRECT EXAMINATION

BY MR. BALLER:

Q Mr. Taylor, in your contact with the Department of Correctional Services personnel, did you ever learn from them of the existence of such a thing as a personal data sheet for employees? And I show you an example which is in evidence as Plaintiffs' Exhibit 21, the second page of that exhibit. Do you know that such a thing exists?

A I know that that exists, yes.

Q Do you know that that data sheet includes a photograph and an item number 11: color, which is filled in to

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indicate race?

A No.

Q You didn't know that?

A No, I did not know that it had color filled in. O.K.? Should I anticipate?

Q Please don't. Please answer my questions.

You did not know. Did the Correctional Services people not indicate to you that their personnel data sheet had color filled in?

A I suspected they had this information, yes. I had a very good suspicion that they had this.

Q But nevertheless you say it was not possible to identify employees by race?

A The prohibition, from my point of view, at this point is we were not out to keep, and I did try to get the O.K. to keep, permanent records or records in our system identifying a man by social security number and by race, and we were not allowed to do that. It was the keeping of that record in the civil service records that was prohibited.

The Commissioner -- well, the Civil Service Department was exhorting separate agencies to maintain such records themselves under approval by the Human Rights Commission and the Civil Service Commission acting jointly, and I had been involved in that and I had a feeling that many

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agencies had made some progress in that direction, but I was not permitted to keep them centrally.

Q Would you agree, then, that the problem of racial identification was a legal or administrative problem rather than a technological one?

A By and large, yes.

Q The thing is that the job analysis is basically similar for both content or criterion validated techniques, is that right?

A Yes.

Q At the time you wrote this proposal, you did state in the proposal, did you not, at page 5 that you did not have a job analysis in existence?

A We didn't have one that went sufficiently far to be quantifiable. We had a consensus. We had this standard process, we had a consensus, but I think I said to Mrs. Gordon the real question is in how far you go in quantification, and we did not have that and we still don't have that.

Q On page 5, paragraph (b)1, does that indicate that development of an adequate job analysis would be the first step of the project?

A It says: "Job analysis of a sample position in the title selected and development of a plan relating each performance criterion developed or particular selection

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method. Present job descriptions and test plans will be the starting point for the analysis. Job audits, interviews with officers and superiors and expert advice will be used to evaluate the original plan."

Q Will you please answer my question? Does it indicate you did not have an adequate job analysis?

A No, it does not. What I went through is practically a description of the process we have described as the general nature of our process of constructing the examination.

Q If you had a job analysis that was adequate at the time, why did you need the project --

THE COURT: Adequate for what?

A Adequate for what purpose?

THE COURT: You must specify adequate for what.

Q If you had a job analysis that was adequate for either a content or a criterion related validation study, why did you need to develop another one?

A It is not another one. It is a carrying forward to another level of precision and sophistication, the quantification, the creation of the criterion measure.

Q You also stated to Mrs. Gordon that you thought that the department's capacity to undertake a criterion validation study reached a point where it was feasible about

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the beginnong of 1972, is that right?

A I think I put that in context where it was organizationally feasible feasible, that it could be executed by the examiner in the regular course of his work.

Q Why didn't you undertake such a study in connection with examination 34944, which was developed after that time?

MRS. GORDON: Your Honor, I think we already made clear that we didn't have demonstrable criteria --

THE COURT: Don't answer the question.

MRS. GORDON: I object to the question.

THE COURT: Overruled.

A We do have to face the question of feasibility all the time, of course. The main element is do you have a big enough group to study, do you have a criterion in existence, are there going to be various things about range restriction on certain people, how high is the pass point. Most of the actual candidateshave not been appointed to another job.

Now, then we have administrative feasibility, that is, how long a frame of time you have to work in and how much work of the standard kind has to be done.

MR. BALLER: Your Honor, I have no further questions of Mr. Taylor. We do think Plaintiffs' Exhibit 42 is an

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extremely pertinent and important document. I could cross examine him about it, but I think if I could specify this as one of the documents we would like to direct your attention to particularly, questioning will really be unnecessary.

THE COURT: Very well. I have one question I wanted to ask Mr. Taylor.

Mr. Taylor, as I understand it, correct me if I am wrong, ladies and gentlemen, something like 90 per cent of the people who took 34944 did not pass, is that correct?

I am asking counsel at the moment.

MRS. GORDON: Your Honor, I think it's 400 --

MR. BALLER: The 90 per cent failure rate was on the 1970 sergeant's exam. I think for 1972 it was about 30 per cent passing, 70 per cent failing.

THE COURT: Thank you.

MR. BALLER: Over all.

THE COURT: I would like to know to what extent, in your experience, it is normal that 70 per cent of a group of people who take a test developed to determine their knowledge particularly of things they are already doing or doing substantially is normal. Is that a normal pass point rate?

THE WITNESS: It is probably somewhat better than normal in an occupational area, an institutional area,

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of that kind with the kind of staffing ratios at the various levels; in other words, the way the pyramid closes 30 per cent is probably pretty good.

THE COURT: Pretty good. By that you mean that it is a high pass rate, is that it?

THE WITNESS: I would think so, yes, for a situation of that kind. It indicates the candidates are doing better all the time and they are passing it at a high rate, I suppose.

THE COURT: Clearly if there are 70 per cent passing this time -- rather, 30 per cent passing this time and only 10 per cent passed on the prior examination that is a possible sign of improvement. It may also mean that the examination was easier, for example.

THE WITNESS: It could very well. The passing point on this examination was set at the legally required maximum that you can set. You can't set more than 70 per cent. The one before I think was less than that. So it is probably true that the examination was easier. There are many possible explanations.

THE COURT: This is the first time I have dealt with civil service examinations. Of course,my experience with examinations has been more at the academic level, where if 30 per cent passed one would wonder about the validity of

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the examination.

I take it that does not apply to civil service.

THE WITNESS: No, I don't think so.

THE COURT: Thank you very much, Mr. Taylor.

THE WITNESS: Thank you. Am I excused?

THE COURT: Yes.

(Witness excused.)

MR. BALLER: For clarity, I am not sure it has been mentioned in any of the questions, the passing score was 70 per cent, which worked out to 53 out of the 75 questions.

We have no further questions. I have checked with the clerk on the status of our exhibits, and although my notes reflect of Plaintiffs' Exhibits 1 through 42 all but 11, 24 and 25 were admitted, her notes indicate that a number were not in evidence. I would like to move their admission at this time if they are not already in. They are Exhibits 23 --

THE COURT: Let me get my list.

(Pause.)

THE COURT: Which ones is it you wish to put into evidence that you believe were but the clerk differs?

MR. BALLER: Number 23.

THE COURT: I don't know if that has gone into

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evidence. It may have during the course of the trial itself.

MRS. GORDON: Perhaps it would facilitate matters if I responded while counsel is reading off his list.

THE COURT: All right.

MRS. GORDON: I have no objection on 23.

THE COURT: 23 is admitted.

(Plaintiffs' Exhibit 23 was received in evidence.)

MR. BALLER: 26 and 27.

MRS. GORDON: No objection, your Honor.

THE COURT: Received.

(Plaintiffs' Exhibits 26 and 27 were received in evidence.)

MR. BALLER: 29, 30, 31, 32, 33, 34 and 35, all statistical tables.

THE COURT: I have an indication they have already been admitted.

MR. BALLER: Would the clerk please note that, then? And number 36.

THE COURT: Number 36 I do not. What is 36?

MR. BALLER: That is the letter from the superintendent to the witness Al Young commending him on his job performance.

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THE COURT: I believe that was admitted during the course of the trial.

MR. BALLER: With the understanding that Exhibits 1 through 42, with the exception of 11, 24 and 25, are in evidence, plaintiffs rest.

MRS. GORDON: Your Honor, at this time, for the record, I would like to move to dismiss the complaint or severable claims therein for failure to make out a prima facie case, and I would request the court reserve decision on that motion pending further evidence taken on the defendants' behalf.

THE COURT: It is satisfactory to reserve decision. I will have the defendants commence their case, anyway.

MRS. GORDON: Thank you, your Honor.

Your Honor, I had intended to start my presentation with Mr. Siegal, who was the principal examiner in this case. However, I have Deputy Commissioner Quick and he must get back to Albany and therefore I would like to call him first.

Would William Quick please take the stand.

I see in back of the room there are at least two potential witnesses with respect to this examination. If plaintiffs would like them excluded, I have no objection.

THE COURT: I think we did agree it would be

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better.

MRS. GORDON: This testimony is not on an expert level.

MR. BALLER: Our position is we would like witnesses sequestered only when the witness testifying is going to be dealing with the development and validation of the exam, not other subjects.

MRS. GORDON: There is some subject matter here that may be parallel. It is best for all concerned to exclude them.

THE COURT: Would those who will be witnesses please make themselves comfortable in the room in the back of the courtroom.

W I L L I A M C. Q U I C K, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. GORDON:

Q What is your address, Mr. Quick?

A 57 Woodsted Road, Boston Lake, New York.

Q What is your present job with the Department of Correctional Servides?

A I am deputy commissioner for correctional facilities.

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Q Would you briefly describe your duties in that job, please?

A Well, we have 19 correctional facilities. The superintendents of these facilities report directly to me. I guess I could best describe it that I am in charge of facility operations, such matters that deal with custody, security, the control of inmates, inmate discipline, inmate care, matters such as visiting programs and correspondence programs, inmate laiason committees, duties such as that.

I might mention there are two other deputies, one a program deputy and he handles those areas, and another administrative deputy who handles areas such as fiscal andplant maintenance and that sort of thing. I have everything else other than that.

Q Is it part of your concern to consider the quality of the employees at the various facilities?

A It certainly is.

Q Would you please tell us what line titles you have held in the department and briefly describe your duties there starting preferably, if you could, with the highest title and going on down?

A Well, I started as a correction officer and within the department went through correction sergeant to correctionlieutenant and as a correction lieutenant, which was in

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two institutions, the Eastern Correctional Facility is where I was appointed a lieutenant, I was in charge of the evening shift there and in charge of the whole institution from 5:00 until midnight. I was on the 4:00 to 12:00 shift.

THE COURT: Where was that?

THE WITNESS: Eastern Correctional Facility, Napanoch, New York. I was in charge of that institution on the evening shift and as such made my security rounds and saw that the evening programs were running smoothly, that inmates -- inmate activity was going as it was supposed to according to our own policy and plans, the officers were alert and doing their duty. I made security checks, would occasionally go out -- we had a farm and midnight milkers and that sort of thing. I would go out and check them. I would answer phone calls from the outside. I would be in charge also of evaluating the officers and making reports of that nature, reporting unusual incidents.

Q Did you also serve as a lieutenant at Greenhaven?

A Yes. Most of my time as a lieutenant was at Greenhaven. There I was on an early shift, 7:20 in the morning until 3:20 in the afternoon, and I would come in and really open the institution, take the count in the morning, which is taken before breakfast, a master count, go down to the messhall and supervise the feeding, following

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feeding go into the corridors and check the inflow of the inmates from cell block areas and then make a tour of shop areas and other program areas, recreation yards, cell blocks, hospital, segregation.

Q Did you have occasion to be a chart officer as a lieutenant while you were in Greenhaven?

A Yes,that was one of my duties as a lieutenant.

THE COURT: What is a chart officer?

THE WITNESS: He is the one that assigns officers to cover all the functions of the institution's operation.

Q By the way, was that a function of a lieutenant at Greenhaven at the time you were there?

A It was at that time, yes.

Q How broad was the function of a lieutenant as chart officer at Greenhaven?

A Well, the early shift was the largest shift in the institution and he did all the charting for that. He prepared charts for the 9:45 sergeant.

Incidentally, he would have to do some clean-up work at the last minute in certain cases. You would set up charts for the evening lieutenants even though they themselves would have to do the same thing. You generally charted the activities of the officers in the institution.

Q Could you just tell me, does a sergeant on a

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particular shift also have charting responsibilities?

A Yes, in some instances. I did as a sergeant.

Q Who does he chart for as a sergeant, usually?

A In some cases a sergeant is in charge of a small shift of officers, and he would do the charting. At other times he might be relieving a lieutenant. In case of a shortage of a lieutenant, he might have to do the charting for a whole shift covering an evening shift in the institution.

Q By the way, approximately what time were you at Greenhaven or what time didyou serve as a lieutenant? I think that would be easier.

A I think I was appointed in '65 and I went out in December of '67 and for those approximately three years I was a lieutenant, most of the time at Greenhaven.

Q While you were at Greenhaven as a lieutenant, did you have occasion to take a job survey at Greenhaven?

A Yes. That was an assignment given to me by the warden at the time and I had to assess very job in the institution, go over the entire plot plan to see that it was appropriate, covering all the activities of the institution at that time.

Q Did you consider duty statements within the context of that job survey?

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A That was part of the survey.

Q How did you determine whether the duty statements were accurate?

THE COURT: Is the duty statement like a job description?

THE WITNESS: Yes, sir.

MRS. GORDON: Let me mark this for identification, your Honor, if that would facilitate matters.

MR. BALLER: Which are those?

MRS. GORDON: D, your Honor. Let me identify it further.

At one time we sent plaintiffs duty statements and available plot plans on a facilitywise basis, excluding ACTEC, which was presently being reorganized,and I believe excluding Bedford for females.

The job descriptions -- the duty statements that I will make reference to in the course of the trial are the duty statements drawn from those for sergeants at the facilities I just indicated.

THE COURT: By the way, what is ACTEC?

THE WITNESS: Adirondack Correctional Treatment and Evaluation Center.

Q Is that new, a reorganization?

A That was. That was the former Dannemora State

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Hospital.

THE COURT: You sure gave it a beautiful new name.

MRS. GORDON: Dannemora had a bad reputation.

Q I show you at this time this document for identification purposes only. Is this document, which says individual post description, Auburn Correctional Facility, March 10,1972, is that a duty statement of the type that you mentioned?

A Yes.

THE COURT: Is that the one he wrote?

THE WITNESS: No. It was before my time.

Q What I want to know about your efforts back when you were in Greenhaven is how did you determine in the course of your survey whether the duties reflected on the duty statements you were reviewing were accurate or did you make any effort in that regard?

A Yes, I did. I examined them all. I had worked there nearly 18 years as an officer, a sergeant, a lieutenant on different shifts, and I had a pretty good idea of what most of the jobs entail.

At other times I would check with the supervisors who supervised those functions. I might even walk out to the area and check the area and saw that the duty statement

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described what the officer was actually doing.

Q Now, were you a correction sergeant also?

A Yes.

Q Will you tell us what facility and approximately what time?

A I made correction sergeant at Greenhaven also, and while a correction sergeant from '61 to '65 I was in charge of a shift from 9:45 in the morning until 5:45 in the evening. It is a shift that actually closed the institution at night and locked it up and took the final count. We would come in in the morning and handle a lot of miscellaneous details such as the number of interviews that go on, parole interviews, chaplain interviews, and that sort of thing, cover the recreation yard, take inmates to showers, commissary and a lot of miscellaneous details, and also cover most of the companies at the noon mess.

I would do most of the charting or last minute charting for that shift.

Q Were you also a correction officer?

A Yes.

Q At what facility?

A I started at Wallkill, Wallkill Correctional Facility, and I left and went to the state police and came back about a year later and went to Greenhaven in 1950 as

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a correction officer.

Q Do you have any work experience that you consider relevant to the operational aspects of the Department of Correctional Services?

A Yes. I was appointed by the Narcotic Addiction Control Commission at the end of '67 and worked four and a half years as a director for them. The first institution I was director of was a control facility, which was actually in a correctional setting with all the security, the same modalities you would find in correctional facilities. It handled the most difficult addicts.

THE COURT: Where was that?

THE WITNESS: Mid Hudson on the grounds of the Matteawan State Hospital in Beacon, New York.

Q Commissioner, if you will talk a little slower the reporter will have an easier job.

THE COURT: Were there any others that you directed?

THE WITNESS: Yes, sir. While director of Mid Hudson I was taken out twice for six month periods. I activated the narcotic center at Arthur Kill on Staten Island and I activated the one in Brooklyn, the Brooklyn Rehab Center on Hanson Place.

Then to go on, in '71, when they had some fiscal

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difficulties and the Narcotics Commission closed a lot of centers, particularly those affiliated with correction, I was made director of a female center for addicts at Raybrook, New York, which is near Saranac Lake.

Q Did you have any prior experience with drug abuse with specific reference to the Corrections Department?

A Yes. I think it was '65 that Greenhaven had the first counseling program for drug addicts that the Department of Corrections had had, and I was in charge of coordinating that effort with an outside organization from the city called Exodus House. I set up the program in conjunction with that group. It is still in effect, incidentally.

THE COURT: That was at which facility?

THE WITNESS: That was at GreenhavenPrison.

Q Was that about 1965?

A Yes, I believe it was 1965 when we first started that program.

Q Have you had occasion to personally give any courses to -- I mean in-service type of courses -- correction personnel?

A Yes. I taught a couple of courses at St. Lawrence University, where every year the Department of Correctional Services had a seminar, two-week seminar, called the Moran Institute, and I taught courses in supervision and human

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relations at that seminar.

Q Would you just tell us briefly what your educational background is?

A Beyond high school, while at Greenhaven I was attending Duchess Community College and taking courses in the correctional administration field: police science and correction, and I unfortunately had to interrupt that when I became director for the Narcotics Commission and didn't have the time to devote to that kind of studying any more.

Q I take it you didn't obtain any college degree or community college degree?

A No, unfortunately, I didn't.

Q Have you had occasion since then to teach courses at Duchess Community College?

A Yes. I felt very privileged they asked me to go back and teach courses in the areas I just described. I taught a course in correction law and I taught other courses in drug abuse.

Q As opposed to teaching courses for the department, have you had occasion to participate as a student, let's say, in any in-service training programs offered by the department?

A Yes, many down through the years, some held by the department on supervision administration, some held by

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the Civil Service Department.

Q Are you a member of any professional organization in the correction field?

A Yes. Right now I am a member of the American Correctional Association.

Q Have you had occasion to represent the department at the American Correctional Association?

A In I believe it was 1966 I represented the department at the association's conference in Baltimore.

THE COURT: What do you mean by saying you represented?

THE WITNESS: Actually the governor makes an appointment for somebody from the New York State Department of Correction to represent the department at these nation-wide conferences. The conferences move around the country.

Incidentally I represented NACC at the same type of conference in San Francisco in 1968.

Q When did you become deputy commissioner?

A In April of 1972.

Q Did you have any role in the development of examination 34944?

A Well, to the degree that shortly after I became commissioner the director of personnel came to my office and told me that we had run out of the existing list and a

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new examination was proposed and there had been a preliminary meeting with the Department of Civil Service and Correction and he came to me for my thoughts on this examination for sergeant-lieutenant at that time.

THE COURT: Who was it that came to you?

A The Department of Personnel for the Department of Correctional Services.

Q Who was that?

A Mr. Bankhead.

Q When did you talk to Mr. Bankhead?

A In early June of last year.

Q Now, what matters with respect to the examination did you discuss with Mr. Bankhead?

A As I recall, there were just two areas. One involved the scope of the examination, the other involved just who would take the examination, experience factor.

Q You mentioned the experience requirement. I would like to show you Plaintiffs' Exhibit 17 in evidence. When you say experience requirement, are you referring to qualifying experience?

A That's right.

Q And then down here it tells you the number of years?

A That's right.

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THE COURT: Where is that?

MRS. GORDON: Plaintiffs' Exhibit 17, qualifying experience, and then you go down here and see what the qualifying experience is.

THE COURT: All right.

Q Now, what did you discuss with Mr. Bankhead with respect to the qualifying experience requirement and how, if at all, was the matter resolved?

A Well, he told me in this early meeting with Civil Service that there had been some notion that an officer should be allowed to take the exam with six months on -- within six months after his appointment and could then take the appointment to a supervisory position of sergeant after two years as an officer.

And I took a dim view of that. In fact, I had some very strong feelings. I didn't feel that was an appropriate amount of experience for an officer even to become a good officer, to have the exposure to the correctional system that he should have, to even act effectively as an officer. I told him I couldn't support that kind of qualifying experience.

THE COURT: What did you recommend?

THE WITNESS: We compromised. We came down to two years to take the examination and three years for an

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appointment. I might add I was a little reluctant there.

THE COURT: In other words, you could take the exam if you were in the service for two years but you couldn't be appointed until you were in three years?

THE WITNESS: Yes.

MRS. GORDON: The suggestion for the six month and two years for appointment situation is in Plaintiffs' Exhibit 9 in evidence. It is the June 2nd memorandum.

THE COURT: Mrs. Gordon, this seems to have come to the end of a particular little sector of your questioning. We have to go to lunch.

What time are you planning to get out of town?

THE WITNESS: It is up to you. Just as long as it is today.

THE COURT: Do you have a car?

THE WITNESS: Yes, I do.

THE COURT: We will resume at 2:00 o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 P.M.

W I L L I A M C. Q U I C K, resumed.

DIRECT EXAMINATION (CONTINUED)

BY MRS. GORDON:

Q Commisioner Quick, at the break we were just finishing up on this qualifying experience requirement.

As a result of your consideration of the matter, was the qualifying experience -- pardon me -- was the qualifying experience requirement as suggested as a result of that scope conference changed?

A Yes, it was.

Q And what it changed to?

A It was changed to two years as an officer to take the examination and three years to take an appointment as a sergeant.

Q Could the qualifying experience requirement have been set higher than two years to take the examination?

A Yes, it could have been.

THE COURT: I don't know what you mean could it have been. It could have been set at anything.

Q Did you have any opinion on whether or not the qualifying experience requirement could have been set higher than two years?

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A Yes, it could have been. At one time it was five years. As a matter of fact, when I took my first sergeant's examination, it took me nine years before I was eligible. It was five years at the time, four years, and I missed it and I had to wait another five years to finally take it.

Q What consideration or what matters did you consider in setting the qualifying experience requirement at the two and one year situation; in other words, lower than the five years?

A I conceded a little bit. The department had expanded, the number of officers had expanded after Attica. We appointed an additional 200 officers and there had been more minority officers employed in recent years, so I conceded that we could drop to three for appointment. I keep in mind that to be appointed in three years a man would have to -- he would have to be motivated, he would really have to be interested in his job to place high enough on the competitive list on an appointment in three years. So I made that concession.

THE COURT: Let me ask who were the people who were suggesting it should be less than three years?

THE WITNESS: Your Honor, there was a meeting between Civil Service and our personnel people in the

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Department of Correctional Services. They just were discussing the scope of the examination, who was eligible, and before anything was finalized they came to my office and wanted to check the department's viewpoint.

THE COURT: As I gathered from what you said before lunch, some people were for setting a period of qualifying to take the same of two years and six months more, as I understand it, to qualify for appointment, is that right?

THE WITNESS: It was six months to take the exam and two years before you could take the appointment.

THE COURT: That makes more sense. In other words, that was a lower proposition than the one where there was a compromise reached?

THE WITNESS: Yes.

THE COURT: What I wanted to know is who were the people who suggested the six months to take the exam and two years to take the job.

THE WITNESS: That came out of the earlier meeting between our personnel people and Civil Service.

THE COURT: I understand. I am asking for names of people.

THE WITNESS: Mr. Bankhead on our part, and I couldn't honestly say who he met with in Civil Service.

Q I would like to call your attention to Plaintiffs'

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Exhibits 4 and 17 in evidence.

MRS. GORDON: Your Honor, that is the class specifications for the correction officer series. 17 is the notice of examination for the particular sergeant's exam we are concerned with and also for a lieutenant's exam given at that time.

THE COURT: 17 and what?

MRS. GORDON: 4 and 17.

THE COURT: All right.

Q Now, it appears from the class specifications --

MRS. GORDON: That is 4, your Honor.

Q -- and from the notice of examination --

MRS. GORDON: That is 17.

Q -- that the time that an individual is required to serve in a sergeant's position before he takes the lieutenant's exam is different from the time that an individual is required to serve in a CO position before he can take a sergeant's appointment.

A Yes.

Q Could you tell us whether in your opinion there are any differences regarding promotion between CO to sergeant as between sergeant to lieutenant which support this difference?

A Well, I guess I would start by saying that you

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really learn about corrections by being an officer and working in the field and working at different jobs and you get an idea of the way an institution has to operate and you understand or begin to understand inmate behavior and the like.

When you finally get to a sergeant, this is the biggest leap that you make, in my experience, in the whole series.

THE COURT: You mean between correction officer and sergeant?

THE WITNESS: Yes, sir. I think you get some idea about supervision by being supervised. After you become a sergeant, of course your own supervisors work with you and give you the benefit of their experience and you go on to learn more and more about supervising and handling men as gain experience as a sergeant.

Once you get that kind of a background, I think the next step is a lot happier. You are still a supervisor at the next step, except at a lieutenant level your responsibilities are just larger, your scope of responsibility is larger. So the hardest step to take is from correction officer to sergeant, in my opinion.

Q There is one aspect I forgot to ask you with respect to that qualifying experience requirement.

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At the time Mr. Bankhead spoke with you in June of 1972, what was the probationary term for correction officers?

A At that time it was six months.

Q And has it changed since that date?

A Yes.

Q What is the probationary period now?

A It changed around September of last year.

Q You mentioned in your discussions with Mr. Bankhead you also considered the scope of the sergeant's exam or the nature, the area it was going to cover. I believe if you look at Plaintiffs' Exhibit 17 there you will find the scope stated as -- I am not going to use all the technical words -- law, rules, regulations, methods and practices, supervision, preparation of written material and good judgment in the correctional field.

Were you satisfied that those areas were to be covered on the examination?

A Yes. We looked at them and I thought certainly if you were going to be a supervisor, even as an officer you should know the law, rules and regulations of the department.

THE COURT: I am not sure I understand the question or, if I do, whether it has been answered.

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Do you want to know whether Mr. Quick thinks that those subjects fully covered what needed to be covered in the exam or were you asking him whether he thought that the exam as designed actually covered those subjects?

MRS. GORDON: No, I am asking him at this point, your Honor, whether he thinks those areas were appropriate subject matter areas to be covered on the examination.

Q Do you think that, Commissioner?

A Yes.

Q Tell us why.

A We examined them and I thought they certainly were appropriate.

THE COURT: Let's be clear about the issues between the parties.

I want to ask plaintiffs' counsel if they dispute that those subjects are appropriate subjects of the exam. I don't understand them to dispute that.

MR. BALLER: Yes, sir, we have raised some question about a number of the subject areas.

THE COURT: That is a different matter. Do you claim, for example, that any of these would not be appropriate? Assuming that you could develop an exam which was satisfactory to you in regard to those subjects, is it your position that the subjects themselves are inappropriate?

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MR. BALLER: Frankly, I haven't considered the question in the abstract with reference to the particular exam. I think the report preparation, supervision and, to a large degree, the laws, rules and regulations section are inappropriate, and that would be our position.

THE COURT: Thank you.

BY MRS. GORDON:

Q On what basis did you make your judgment that these were appropriate subject matter areas?

A If I review them one by one, the laws, rules and regulations is something that all our correctional people should be aware of, and that goes right up through all the supervisory ranks.

Modern correctional methods and practices, certainly they should be aware of what happens in corrections not only in New York State but I think have some idea what's happening around them even outside the state. We are heading more and more towards professionalism. Even the officers are considering themselves to be professionals. We are not in a vacuum. We should know what's been happening in corrections in general and we should be progressing, using new methods that have proven themselves in other areas.

Good judgment. I don't dispute that at all.

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There should be some area on testing judgment.

Supervision. There should be some knowledge of supervision techniques if you are going to be a supervisor.

Written material. Reflecting back on the mounds of written material that crosses my desk every day, and I spend a lot of time reading reports on serious incidents, some of which prisoners take up to the department, where sergeants report on inmate activity where they are brought before our own disciplinary courts, I think it is an absolute necessity to be able to prepare written material so it is clear and follow some kind of logical sequence and the reader gets a pretty clear picture of what the writer is trying to say.

Again, going back to our disciplinary courts, we have had some changes there. We have a panel and the panel knows what it sees in the reports when they are trying to judge an inmate's behavior.

The more I thought about it the more important I thought that particular area was.

THE COURT: What is the difference between administrative supervision and supervision?

THE WITNESS: I think that supervision at sergeant level is a kind of basic, first-line supervision. As you get up into the higher ranks, you might be involved in other

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areas, maybe like in budgeting and, you know, use of supplies and materials.

THE COURT: Insofar as we are dealing with a sergeant's job, though, what would be the difference between supervision and administrative supervision?

THE WITNESS: I don't think the sergeant would be involved in administrative supervision to any great degree and I note that the lieutenant was tested, as I read this, and the sergeant wasn't. The sergeant is a line supervisor. Administrative supervision comes later on.

THE COURT: I misunderstood. I thought it applied to 34944, but I see now it does not.

BY MRS. GORDON:

Q Turning to another matter, Commissioner, what purpose or purposes do provisional appointments serve in the Department of Correction?

A Well, they enable us to fill a position where there is no existing civil service list. As happened just recently, a sergant list ran out and a new one hadn't been promulgated and we started to have vacancies and this provisional appointment ruling allowed us to placepeople in those positions.

Q And --

A It bridges a gap.

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Q Technically speaking, who makes the provisional appointments in your department?

A Technically, that would come back through my office. The ultimate decision on any appointment is back in the central office.

THE COURT: You mean the Commissioner's office?

THE WITNESS: Right, through the personnel office.

Q In making provisional appointments, whose judgment is given major weight, if anyone's?

A Generally it is back in the field at the facility. The superintendent and other high-level custodial staff there would submit names for provisional appointments.

Q Is that principally the superintendent at the facility?

A Yes. We would get it from the superintendent and he of course would use the judgment of his staff.

Q What kind of information would lead let's call it the Albany office to deny a superintendent's recommendation in this context?

A Well, I suppose of we had some information that would lead us to believe an employee would not make an effective supervisor. It doesn't often happen but we might get some complaints from some other officers or superintendent that he was going by them and if we look

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into it we might concur.

Q Is this essentially a negative input rather than affirmative investigation of his qualifications?

A Yes. It doesn't oftenhappen.

Q Do you consider that the process by which provisional appointments are made to be an appropriate procedure for selecting qualified, let's say, sergeants?

A Well, you know, certainly we would like to take people off a civil service list where it's objective and people are tested fairly. In this case, there is usually no other alternative than to go by judgment of our field people.

Q By the way, on the basis of your experience, are there some individuals who make good officers who don't necessarily make good sergeants?

A Well, absolutely. What the superintendent would look for, of course, is somebody who in his judgment is a good officer and has the potential of making a good supervisor. Certainly it doesn't always work that way. Some of our best officers are poor supervisors, and it might turn out it's in the reverse in certain cases, where somebody would come off a list that wasn't one of the best officers and might be a good supervisor.

Q What advantages, if any, does the competitive

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examination system have over the provisional appointment system, in your estimation?

A Well, it is certainly more objective. It subjects all the candidates to the same examination. It seems to be a much fairer process.

THE COURT: Have there been many instances during your experience in the department of provisional appointments?

THE WITNESS: Yes, sir.

THE COURT: Do you have any opinion as to the extent to which those who were provisionally appointed later turned out to be qualified for the job?

THE WITNESS: Well, to make a provisional, really they would have to be qualified to take the examination and if they were successful inpassing it then it be appointed. That's one of the things we do ask, that they be qualified if they were high enough on the list for appointment to the same job they are acting on provisionally.

We have had in the last year many, many provisionals. The list had expired, there were a lot of new sergeant openings, and we were filling them with provisionals.

THE COURT: That doesn't quite answer my question although it is helpful. What I want to know is whether you have any opinion in the light of your experience of having

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seen provisionals operate, and I assume a number of them ultimately were appointed --

THE WITNESS: Yes, some of them.

THE COURT: -- whether you would say that on the whole the department had a good experience with provisionals and that they have turned out to be qualified when they were permanently appointed.

THE WITNESS: I think on the whole, yes. There certainly have been exceptions, but I think if I balance it I would say yes.

THE COURT: There are exceptions when people take the test and qualify.

THE WITNESS: Certainly.

BY MRS. GORDON:

Q Commissioner, just a point of clarification. Prior to the recent situation where the list was exhausted and you made a number of provisional appointments, has it been common within the department to use provisional appointments in the correction officer series?

A When the circumstances take place, yes.

Q At this time, Commissioner, I show you Defendants' Exhibit Q.

MRS. GORDON: Frankly, at the time we drew our exhibit list I wasn't exactly too sure how we were going to present

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our order of proof. Moreover, I [illegible]too sure who was going to be here to testify exactly. Some of these documents may be duplicative in terms of having the individual here. However, I have no objection to putting them in the record if it will aid the court -- to keep the record clear when we finally conclude.

Q I show you Defendants' Exhibit Q.

MRS. GORDON: I move it in evidence. Is there any objection to that?

MR. BALLER: Let me find out what it is.

MRS. GORDON: If there is any objection, it doesn't have to be placed in evidence because we do have the witness.

(Defendants' Exhibit Q was marked for identification.)

xxxx

MR. BALLER: I don't think so, but could we hear something about what this concerns?

THE COURT: Why don't you ask him questions for the moment. Get it identified.

Q On or about October 2, 1972, did you have occasion to write the memorandum before you?

MRS. GORDON: Your Honor, I think it would be a lot easier if I move it in evidence at this time and then we can refer to it more conveniently.

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THE COURT: I thought you had offered it in evidence.

MRS. GORDON: Can we have it in evidence, Mr. Baller?

THE COURT: Take your time and look at it.

MR. BALLER: The only trouble we have with this document is what it refers to.

THE COURT: Ask the witness what it refers to. That's easy enough.

Q Commissioner Quick, what does this exhibit refer to, this exhibit marked for identification?

A It refers to a survey of custodial staffing positions. It's a survey.

THE COURT: By the department?

THE WITNESS: By the department.

Q As of October, 1972, of course?

A Yes.

MRS. GORDON: May we have it in evidence now?

MR. BALLER: Yes. No objection.

THE COURT: Received in evidence without objection.

(Defendants' Exhibit Q was received in evidence.)

Q Now, this memorandum refers to a package. It's apparent from this memorandum that you and the commissioner's office are sending a package to the various superintendents

of the facilities.

Did this contain plot plans and duty statements for the correction officer series?

A Yes, it does.

Q Now, were those materials that you referred to in that memorandum of this type? Did they include this type of material?

MRS. GORDON: Let the record indicate I am showing the witness Defendants' Exhibit K for identification.

Q I am only interested in whether it consisted of this type of material.

A Yes, that was some of the material that we would have sent out.

THE COURT: Do I understand you to be using the phrase "plot plan"?

MRS. GORDON: Yes.

THE COURT: What are plot plans?

MRS. GORDON: I will show your Honor. That's a plot plan (handing).

THE COURT: Would you describe for the record what a plot plan is?

THE WITNESS: It's a plan that shows every position that's covered in the institution and the times that it covers.

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Q And would you just describe what this other document here is?

MRS. GORDON: Let the record indicate that Defendants' Exhibit R is arranged by facility, each consisting of an individual post description and a plot plan where the plot plan was available on the day defendants' attorney picked up the materials.

Q Just tell the judge, if you would, what the first document is, the individual post description.

A It's a post description that describes the duties of anofficer assigned to a particular post. In this case we are looking at one for a cell block sergeant. It describes his duties.

THE COURT: For a particular cell block or all cell blocks?

THE WITNESS: It could be in some case for a particular one or in a smaller institution all of them.

MRS. GORDON: We will get to these materials in a moment, your Honor.

Q What was the occasion, and I am referring to October of 1972, when you transmitted that memorandum, what was the occasion for your transmitting the plot plans and duty statements to the facilities?

A Staffing surveys have beengoing on for quite some

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time. In fact, it started just before I became commissioner. At that time they were completed and the completed plans were sent back to the institution, in other words, saying: these are your staffing patterns; these are your new plot plans.

THE COURT: You mean they were just sent out because it was finished?

THE WITNESS: It was finished. Then they knew the amount of officers they had in each position.

Q What purposes do the duty statements and plot plans -- what purposes are they used for by your department?

A Well, we keep them all. We have an idea in each institution of what each officer and what each supervisor does in the custodial series. There are many times when there will be requests for additional officers and we are able to go back and even with the use of some of our blueprints and schematic drawings to look at what coverage we have in an area and determine whether we need more. It might even be necessary to go in the [illegible] and make some kind of check to see if the request was a valid one.

They are used in institutions also for seniority bidding and some other reasons. Of course, we use them for budget, too, to validate our requests for new positions or existing positions in some cases.

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Q From and after October of 1972 down to the present time, has the department continued -- by department I am here referring to the Albany office -- continued to receive these duty statements and plot plans from facilities?

A Yes. We change sometimes and new duty descriptions and plot plans are necessary to update them and give us a clear picture of what is going on at a given time.

Q As the duty statements come into the central office, are they verified or checked on in any way?

A Yes, my staff looks them over and comments to me on them.

Q Do they take any action if they have a question?

A Yes, certainly. We get right back to the institution. Sometimes we send them back and ask them to be done over or raise certain questions that would come to our mind in terms of the descriptions.

MRS. GORDON: At this time, your Honor, I would like to offer in evidence Defendants' Exhibit R, which consists of the duty statements and plot plans for correction sergeant throughout the state system. As I said before, ACTEC is not present, that facility being presently reorganized, and Bedford Hills -- the female section of Bedford Hills is not present by reason of the fact it is a female section and not pertinent to this case.

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MR. BALLER: We have no objection to their admission for the purposes which have been implied by the questioning so far, that is, showing what the Correctional Services Department thinks that the duties and so on of the sergeant jobs are as of October, 1972, and later. We would have some objection based on the foundation up to this point if they were to be used to imply anything about the preparation of the exam.

MRS. GORDON: Your Honor, just let me be clear at the outset. I think there was a question to Mr. Taylor from counsel before. It is defendants' position in this litigation that these plot plans were used as a way of verifying the results reached in giving examination 34944.

THE COURT: Let me comment before you go further. You may take that position but you have to establish it by testimony.

Mrs Gordon

THE COURT: Certainly. We plan to do that, your Honor. I don't want to leave the impression --I think Mr. Baller may have the impression we are intending to use these documents as part of the process by which 34944 was developed. That is not our intention. This is the independent verification of that process, we believe.

THE COURT: All right. Defendants' Exhibit R is admitted into evidence.

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MRS. GORDON: For convenience, just mark DX R on the first page of eachof those sets. We may have done it already.

(Defendants' Exhibit R was received in evidence.

Q Commissioner, I note at the bottom -- so the record may be clear, an individual post description is divided into three sections on the form. The third section states "Requirements" and then states on the form, at least the form I have here, which is for Auburn Correctional Facility -- attitudes, knowledges and skills.

In your opinion, Commissioner, is it important for the duty statement to have on it the attitudes, knowledges and skills, inother words, is it important for that part of it to be filled out?

A No. I will generally look at the individual post description. Unless there were some special skills required for a particular job, which doesn't happen too often.

Q Of course, I am only asking in the context of the purposes these are used for by the Department of Correctional Services.

A Duty description is what we really look for on that.

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Q Have you reviewed Defendants' Exhibit R, this set of duty statements and plot plans?

A Yes.

Q In your opinion, do these duty statements give you a clear idea of the functions of a correction sergeant?

A Yes, they do.

Q In the facilities?

A Yes, I think they do. I think anyone looking at them would have a pretty good idea what his responsibilities are.

Q Do you say that in the context of bringing your correctional experience to bear when you read these?

A Yes.

Q You noted in your October, 1972, memorandum that some of the duty statements that you were then sending back to the facilities appeared to be hastily drawn as of that date.

A Yes.

Q Do you find the same problems or any problems with respect to the descriptions appearing on the duty statements, Defendants' Exhibit R, that you have reviewed?

A No, I reviewed them and I think they are pretty accurate and descriptive.

THE COURT: They were spruced up, were they?

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THE WITNESS: Yes. I guess some of them were done in haste and they were sketchy and we asked they be redone to reflect what the duty of the position called for.

Q Do you find any differences between facilities in terms of these duty statements?

A Yes, certainly.

Q Could you just tell us?

A Some of them have done a real excellent job and they are very comprehensive and detailed. Others, while they are good might not show that detail.

THE COURT: I take it from what you say that you are not saying that the job is different at the different institutions but that some institutions did a better job of describing the position than others?

THE WITNESS: Yes,sir.

Q Since the date you became deputy commissioner, have you had occasion to go out to the field, by that I mean visit facilities?

A Yes.

Q Approximately how often do you go and where do you go?

A It's hard to say on a regular basis. We would hope to get out once a week, and we don't do that. But I have, since I am commissioner, made the round of the major facilities and I have been back two, three, four times

to some of them.

Q Could you just tell us briefly what in your opinion are the chief functions or responsibilities of a correction sergeant?

A Well, he generally has an area which he has to supervise and officers who are on duty within that area and he has to be alert to what the security precautions are for that particular area, and he has to see the quality of the inmate care under his supervision. He is certainly concerned with the flow of inmates in that area. He has to be concerned with the discipline of the inmates, whether or not they are following the rules and whether or not the employees are applying discipline uniformly and fairly.

Many times he supervises the feeding in part of the dining room. Then, of course, he has to work with the officers under his command. He has to counsel with them, he has to explain new policies. Sometimes he even has to discipline, write them up for disciplinary charges.

It is certainly involved in their training process, both in-service and even in the training academy, that a sergeant be called upon to teach a certain course. There is also his responsibility to his superiors. He often has to make investigations and report them to the

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superintendent in writing.

There are many details that come up which won't show on plot plans. Some of them are emergency in nature and some can be foreseen. He has a very complex job.

Q Are there any procedures available to you or to your department for dealing with employees who have demonstrated incompetence or psychological instability in their job? And by that I am referring to a context outside of your disciplinary infraction procedures.

A Well, yes. If a person isn't competent, in the first instance if he happens to be on probation and there has been a certain time elapsed and there has been an effort to upgrade his performance andhe continues to be incompetent, he can be terminated from probation. Should he be past --

THE COURT: What does that mean -- he is put back to correction officer?

THE WITNESS: No, that applies to any employee on probation.

THE COURT: I understand that. If we take, for example, the rank of sergeant and somebody is on probation as a sergeant and he was not doing a good job, you used the word "terminate." Would that mean he would be dismissed?

THE WITNESS: Yes, if he were on probation.

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Q I think there may be some confusion. Is there a probationary term for correction sergeant?

A No, there is not at this time.

THE COURT: Is it only for correction officer?

THE WITNESS: Yes, sir.

Q In terms of a sergeant, for example, what measures could be taken?

A If he continued to be incompetent, I think it's incumbent upon the departmento make every effort to upgrade his performance and change attitudes, if that were the case. If he continued to be incompetent, we would have no choice but to prefer charges against him. These charges could, in the final analysis, lead to his discharge.

Q Are there any medical leave procedures available?

A There is medical leave and there is disability retirement that we could even offer in certain cases where it was obvious that the person couldn't come back in a reasonable amount of time and perform the job that he was assigned to.

Q Do you believe, by the way, that an employee's attitude is important to the performance of his job?

A I certainly do.

Q What steps would you take as a supervisor about poor job attitude should you find a case like that?

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A Well, if I were the supervisor, I would want to counsel the man, I would want to talk to him, I would want to determine what made his attitude such, and I think I would make every effort to turn it around and make it a positive one.

Q Have you read examination 34944?

A Yes.

Q Did you read it prior to the time it was administered in October of 1972?

A No.

Q Having read it now at this point, do you believe that 34944 is an appropriate examination for the sergeant title?

A Yes, in my opinion it is.

Q I believe this morning -- by the way, it is not my intent, Commissioner, or your Honor, to take the commissioner through the examination question by question. However, a question did come up this morning. I think counsel mentioned it to Mr. Taylor and we have since determined that it is question 18 in Plaintiffs' Exhibit 18 the first booklet of the examination. The question reads:

"If a rule is unpopular with the inmates the supervisor should"

And I believe the correct answer is:

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"Consistently enforce the rule regardless of its unpopularity."

Do you agree with the nature of that question and with the answer?

A Certainly I do. If a rule is in effect it has to be enforced by our people. The fact that it is unpopular, in my experience there are a lot of rules that are absolutely necessary that are unpopular with the inmates.

Q Could you give us an example of what you consider to be an unpopular rule that has to be enforced?

A Yes. There is a rule about gambling in prison.

THE COURT: There is one about leaving a prison.

THE WITNESS: That also.

A As I mentioned, in gambling, a lot of inmates like to gamble. When they are disciplined for gambling they are upset about it. It is very unpopular.

In our correction experience, we see inmates get overly involved in gambling. I saw an inmate who owed to cartons of cigarettes to another inmate which he lost gambling. It has stood down the ages.

THE COURT: What about decoration of cells?

THE WITNESS: Yes.

THE COURT: I am talking about pictures.

THE WITNESS: That's a continual fight. When

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they get outlandish and too pornographic, if that's the right term, and we have visitors coming around, young, old, female and the like, we don't think they should properly be displayed on a cell wall.

Another thing. In my own experience, we will paint the cells up with nice fresh paint and they will glue a picture on it and if it is one that has to be taken down the paint comes with it. We have to establish rules against this kind of thing. I think we are fairly liberal in letting them display certain things in their cell.

Q Let me clarify it for a moment.

If a sergeant, for example, thinks that a rule is inappropriate, are there any procedures that he can go through for seeking a change in that rule?

A Certainly.

Q Commissioner, could you explain to the court the occasion for the Department of Corrections taking an active role in the litigation of this case on the defendants' side?

A Yes. We have a new commissioner. Commissioner Oswald left us a short time ago --

THE COURT: I am a little confused. Who are the defendants?

MRS. GORDON: Your Honor, the occasion for my

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question is, as your Honor noted in Vulcan Society, and there are numerous cases in this field of civil service test litigation, there have been occasions when one of the defendants sued has taken a position antithetical to that of the other defendant, namely, the operating agency versus the civil service agency.

I am just asking Deputy Commissioner Quick the occasion for his department siding with Civil Service in this case.

THE COURT: My puzzlement came from the question. I don't find it surprising that a defendant justifies the position for which he is being sued.

MRS. GORDON: My reference of course was to the fact defendants were obliged to produce documents and things like that. They certainly did that.

Q Could you just tellus what happened?

A We have a new commissioner, Commissioner Preiser. He just came into the department shortly after this injunction, and we had a staff meeting of the deputy commissioners one day and we were talking about problems within the department. We brought to his attention that we had just made approximately 100 promotions and that we had moved officers and families all over the state and now there is this injunction taking place and we have been getting a

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feedback from the institutions, they were unsettled, they didn't know where they were, and they would have to change and we thought it was quite a problem.

At that time he said, "What position is this department taking on it?"

I honestly didn't have a position we had taken at that time. He is an astute man, an attorney in background. He said, "We have to have a position. These are our people." He said, "I want to personally take a look at the exam." He said, "We are going to have a position. If we feel it is a good exam we will stand behind it. If we feel it is a poor examination we are not going to defend it."

We subsequently got hold of Civil Service and had their examiners bring the exam over, and the commissioner took a great deal of time in looking it over himself and asking a lot of pointed questions, and at the end he complimented them on what he thought was a good examination in his opinion. That's why I'm here.

THE COURT: While we are on the subject and although it is not part of the questioning, I want you and your colleagues to know that the issuance of a restraining order doesn't indicate any view of mine with regard to the ultimate determination of this case one way or another, and

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I am not saying that encouragingly or discouragingly. I felt the plaintiffs had put before me enough evidence that it was my responsibility to freeze the situation until it could be reviewed further. That is all it meant.

THE WITNESS: I understand.

THE COURT: I am sorry and I understand it always creates problems.

MRS. GORDON: That is all for me, Commissioner.

MR. BALLER: We would like just a second before proceeding, your Honor.

THE COURT: All right.

(Pause.)

CROSS EXAMINATION

BY MRS. GREENBERG:

Q Mr. Quick, I would like to show you one portion of Defendants' Exhibit R that's headed "Individual post description - facility Greenhaven."

Is this an adequate -- what you consider an adequate duty statement?

A Yes, I think I understand it.

THE COURT: You say you understand it.

THE WITNESS: It's adequate for anybody who would be in a positionto review it. He would know that they are trying to explain in it.

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Q I would like to show you another part of Defendants' Exhibit R which is headed "Individual post description - Ossining Correctional."

THE COURT: Are you asking the same question?

Q Would you feel that that is a more complete, better duty statement?

A It's more detailed. I would say much. But it's done in a different form. It's done in kind of a narrative form. The other is done in an outline or numerical form.

Q Is this clearly written, this duty statement for Ossining Correctional Facility?

A Yes, I think that it's pretty clearly written.

Q Did Nathaniel Hayes participate in drawing up the duty statements for Ossining Correctional Facility?

A I would have no way of knowing. I would have no way of knowing whether he did or he didn't.

THE COURT: Would you have any way of knowing whether Dean spoke to the President?

THE WITNESS: I have no way.

MRS. GORDON: If counsel wishes, I obtained information which indicated Mr. Hayes had some role in drawing up the duty statement at Ossining. I will stipulate he had a role. I will not stipulate that he wrote it himself or all of them.

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THE COURT: I think if plaintiffs feel it is important they can put him on the stand.

MRS. GORDON: If counsel wishes me to stipulate he had a role, I will stipulate it.

THE COURT: That doesn't enlighten me very much, even though I appreciate that.

Q I just have one more question about the Ossining Correctional Facility post description.

Is this one of the kinds of report a sergeant has to submit to his superiors as you discussed?

A It might be a detail that is assigned to a sergeant or a supervisor to describe the activities on a certain post. It sometimes is detailed to somebody of higher rank, but at least a sergeant. I will put it that way.

Q I would like to show you now the first post description I gave you, for Greenhaven Correctional Facility. You testified between 1965 and 1967 when you were at Greenhaven you drew up duty statements.

A Yes.

Q Is this the type of duty statement or, indeed, is this the duty statement that you drew up?

A No, I would not think -- I couldn't possibly remember it. I note it is dated 1/4/72 on top and I

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assume somebody else has done that.

Q Can you tell me, do you recall whether this is the type of duty statement which you drew up at Greenhaven?

A I would think mine would be more in the narrative form, as I recall it. It has been a long time. I can't possibly be accurate on that. I think the early ones were more in the narrative form.

Q The earlier ones were more in the narrative form?

A That is my belief now. Again, that happened a long time ago. I couldn't be sure.

Q When you were answering Mrs. Gordon's questions about the scope of the examination which you reviewed, you discussed five areas that were covered by the examination. You said that you thought each of them was an important area for testing for sergeant.

A Yes.

Q Did you think that some of those areas were more important than others?

A I don't recall thinking at the time that any one was more important than the others. I thought it kind of reflected some of the things I would expect a sergeant to know. I don't remember placing any importance on one over another, no.

MRS. GREENBERG: Thank you.

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THE COURT: Anything further?

MRS. GORDON: I just want to clarify one thing.

REDIRECT EXAMINATION

BY MRS.GORDON:

Q I believe on direct examination you stated that in revieweing these some were more detailed or more comprehensive than others.

THE COURT: Are you speaking about --

MRS. GORDON: Referring to Defendants' Exhibit R.

Q That some were more comprehensive and some were less comprehensive. Plaintiffs' attorney showed you Greenhaven Correctional Facility, which you now don't see, but I do find Auburn. In comparison, for example, to the duty statement that Mrs. Greenberg just showed you with respect to Greenhaven, this one for Auburn, would that be more comprehensive?

THE COURT: Isn't that something a layman can conclude?

MRS. GORDON: Yes. I thought I would not bother to redirect on that point. I just wanted to establish it for the record.

A Yes, it's more elaborate.

Q Here is Greenhaven.

A It is definitely more elaborate.

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MRS.GORDON: Thank you very much, Commissioner.

THE COURT: Have a good trip.

(Witness excused.)

MRS. GORDON: Your Honor, if we are going to take a brief afternoon break, could we take it now before I call the next witness.

THE COURT: Allright.

THE CLERK: The court will take a ten-minute recess. All rise.

(Recess.)

(In open court.)

MRS. GORDON: I call Kenneth Siegal to the stand, please.

K E N N E T H S I E G A L, called as a witness by the defendants, being first duly sworn, testified as follows;

DIRECT EXAMINATION

BY MRS. GORDON:

Q Mr. Siegal, would you state your address for the record, please?

A 1066 Curry Road, Apartment 35, Schenectady, New York.

Q What is your present title with the Department of Civil Service?

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A Associate personnel examiner.

Q What is your educational background?

A I have a Bachelor of Science degree from Rennselaer Polytechnic Institute, and I am presently in a master's degree program at the State University of New York at Albany. The program is in educational psychology and statistics.

Q What courses have you completed in that program pertinent to the testing area?

A Well, I have a course in educational and psychological test measurement, I have six hours in educational psychology and nine hours in statistics and experiment design.

THE COURT: Let me ask again, Mrs. Gordon, is this testimony going to be transcribed?

MRS.GORDON: We just had a discussion about that with the court reporter. I had asked for daily on Mr. Taylor's testimony. Mr. Baller wanted Mr. Taylor's testimony. I asked for daily. I was told I couldn't have daily. I assumed I could have expedited. I was just told withMr. Baller that we have no expedited. So in effect we have no testimony, no transcript at all. If your Honor could do anything about that I would appreciate it. We certainly would like either expedited or daily copy on

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both Mr. Taylor and this witness at a minimum.

THE COURT: Off the record for a minute.

(Discussion off the record.)

THE COURT: At least with regard to Mr. Siegal or experts, can I ask the parties to submit to me as an exhibit or as part of their memorandum or in any form that they want to the qualifications so that I don't have to sit here and scribble them down?

MRS. GORDON: Sure. Actually I think both the experts, your Honor,have printed vitaes, so it alleviates the problem.

THE COURT: Do you have one, Mr. Siegal?

THE WITNESS: No, I do not. I could write one up.

MRS. GORDON: Mr. Siegal would be glad to write one up for you.

Q What other titles have you held -- strike that.

What other titles have you held with the Department of Civil Servide?

A Personnel examiner and senior personnel examiner.

Q Are these titles reflected in the class specifications of the personnel examiner series?

MRS. GORDON: May I have Defendants' Exhibit A for identification,please? Give me A, B and C, please,

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gentlemen.

Your Honor, I should note these are two summer law assistants at theAttorney General's office. I think this is a learning experience for them. They are both at law school.

THE COURT: It is an experience for me, too.

Q I show you Defendants' Exhibit A for identification and ask you if that is the class specification for the personnel examiner series in which you employed.

A Yes, that is.

MRS. GORDON: At this time, your Honor, I move in evidence Defendants' Exhibits A, B and C. B and C are the class specifications for other title series which have relevance to the documentation produced in defendants' case. They were previously provided to plaintiff.

Is there any objection?

MR. BALLER: Your Honor, we think these exhibits have very faint relevance to the case, but we won't object to them.

THE COURT: I will take them for faint relevance.

xxx (Defendants' Exhibits A, B and C were received in evidence.)

MRS. GORDON: In view of counsel's questions, I am happy I didn't draw a line of questions around those

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class specifications.

Q The titles you mentioned that you held personally, did you hold them by competitive examination?

A Yes.

Q When did you first join the Department of Civil Service?

A July 11, 1968.

MRS.GORDON: Can I have Defendants' Exhibits I, J and K, please?

Q Mr. Siegal, I am going to show you Defendants' Exhibits I, J and K for identification, such documents consisting of a course outline and text in test construction and analysis, and ask you whether or not you took a course substantially along these lines at the time.you came to the Department of Civil Service?

MRS. GORDON: Your Honor, I would like the record to reflect that we have an error on J. It is a text book and we obviously have, through the xeroxing process, omitted a major portion of the text.

THE COURT: Mrs. Gordon, to be perfectly honest, I don't think I am going to read through all that material to satisfy myself this gentleman has a right to testify on testing.

MRS. GORDON: That is the type of course we put

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our examining personnel through. I don't expect your Honor to read it all, but it is important to show we have such a course and that is in fact what we do.

Q Do these three documents show what course you took aside from the fact we are missing a portion of the text in Exhibit J?

A I have taken that course or similar to that one since I was employed in Civil Service.

Q Was this course given to you by Civil Service?

A Yes.

MRS.GORDON: I move these documents in evidence subject to the correction of J.

MR. BALLER: No objection.

THE COURT: All right.

xxx (Defendants' Exhibits I, J and K were received in evidence.)

Q In terms of the development of examination 34944, could you please tell us what position you held at the Department of Civil Service when the department first received a request for that examination and whether or not your position changed during the time after, with particular relation to the examination, of course?

A When the request first came in, I was a senior personnel examiner. In July I was promoted to the position

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of associate personnel examiner. During that entire period of time I did have responsibility for the examination in that series.

Q Did your responsibility with respect to the examination change at all between the time you were from senior personnel examiner to associate?

A The responsibilities didn't change. My superiors changed and I then reported to different people than I had before, but I still maintained the responsibility for the examination.

THE COURT: You still had the same job to do with regard to that exam, is that correct?

THE WITNESS: That's correct.

Q Have you had occasion to consider the differential impact of examination 34944 on minority candidates?

A Yes.

THE COURT: Would you explain to me what you mean by the term "differential impact"?

THE WITNESS: Well, there are several things that I have looked at but one thing would be based on the records that we have been able to get. We have looked at the difference in --

THE COURT: What do you mean by the term "differential impact"?

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THE WITNESS: It means differences of some type in the performance of candidates of differing ethnic backgrounds.

THE COURT: On the exam?

THE WITNESS: Yes.

MRS.GORDON: Could I have Plaintiffs' Exhibit 12?

THE COURT: I want to be sure we are all talking about the same thing.

Q Did you use as a basis for your consideration Plaintiffs' Exhibit 12 in evidence, which was provided to plaintiffs by your office?

A Yes.

MRS. GORDON: This is the computer display, your Honor.

THE COURT: Is that in the package here, Mr. Baller?

MR. BALLER: It is Exhibit 12.

THE COURT: May I take a quick look at it?

MRS. GORDON: Sure.

THE COURT: O.K.

Q Did you reach any conclusions with respect to the passing rates of black, white and Hispanic candidates on the total examination?

A Yes.

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Q For our convenience, will you just tell us what those conclusions were?

A Well, again, based on the information we had, the overall passing rates for whites was approximately 30.9 per cent, for blacks 7.7 per cent and for Hispanics 12.5 per cent.

Q By the way, Mr. Siegal, I recall the other day we made a correction to this display, Plaintiffs' Exhibit 12. I think the number of blacks went from 103 to 104 and I assume the number of whites went down one.

Are your calculations based on that correction?

A Yes. Another individual was found or discovered who was black at Ossining who received a raw score on the test of 56. He had originally been assumed to be white.

THE COURT: When you say you reached conclusions, you don't mean there was anything discretionary about your finding here, you mean you mean you made a calculation which resulted in these percentages?

THE WITNESS: That's correct.

MRS. GORDON: I am sorry, your Honor. I am afraid statistics is not my forte. I am trying to frame the questions generally.

Q Did you consider the differences in these passing rates on the total test to be statistically significant?

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A The difference is statistically significant as far as I can tell, yes.

Q From the data provided on Exhibit 12, have you been able to make any other statistical analysys or interpretations with respect to the different performances between black, white and Hispanic candidates?

A Well, there are several things that are clear from the displays themselves.

THE COURT: Are you speaking of Exhibit 12?

THE WITNESS: Yes.

A One thing is that, for instance, the majority of black candidates are located at Ossining, about 80 per cent of the group are located at that facility.

THE COURT: Where is that indicated?

MRS. GORDON: Tell the judge the code.

THE WITNESS: On the display for blacks, which I think is the first one in there, the very first page, if you read across the top where it says 1007, that's the code for Ossining. The numbers down on the bottom of that column, 81 and 88, the first number,81, refers to the total number of blacks at that facility who took the test.

THE COURT: That seems to have been altered in the light of the discovery of one person you thought was white who was black.

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THE WITNESS: It would now be 82.

THE COURT: And 87.

MR. BALLER: I think your copy has been corrected to reflect that change.

THE COURT: That is what I said.

THE WITNESS: The number below 81 and now 82 would be 89. It is cumulative from left to right.

THE COURT: 89.

THEWITNESS: If we look at the Hispanic display, we see that we have nine out of a total of 16 of the Hispanic individuals located at Ossining.

THE COURT: Is that the second page or the third page?

THE WITNESS: It would be the third page, I believe.

THE COURT: I assume you are correct. What deduction is to be drawn from that?

THE WITNESS: It is certainly clear that the majority of minority group personnel who took this examination were located at one particular facility, at Ossining.

THE COURT: I understand that. What effect would that have on passing?

THE WITNESS: In addition, if we look at the last display, which is for white candidates, and we look at the average test rate among the whites at these facilities or

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the passing rate for whites at the different facilities, we see it covers quite a range and there are differences among the whites at different facilities.

BY MRS. GORDON:

Q Are these differences among the whites at different facilities statistically significant?

A Some of the differences between whites at different facilities are significant.

Q And in terms of statistical analysis, what did you do on the basis of observing these characteristics in the statistics?

A Well, in order to compare, for instance, the difference between blacks and whites on the examination and seeing that there are differences even among whites at different facilities, seeing also that the majority of the minority candidates are located at a single facility, it would make sense to compare the blacks and Hispanics at Ossining to those whites at Ossining in the sense that we would expect them to have similar types of experiences or training or what have you.

Q Now, did you in fact make comparisons between black, white and Hispanic performance at Ossining and/or Greenhaven?

A I did.

Q What did you find with respect to the passing rates of black and white candidates at Ossining? Let's take Ossining first.

THE COURT: Is that on anything --

MRS. GORDON: That is a conclusion that is drawn. I don't know if "conclusion" is the right word. That is concluded on the basis of the data provided in Exhibit 12. I think I have a little list here which Mr. Siegal worked out. I would be glad to show plaintiffs and the court a copy.

THE COURT: I think this kind of complicated material would be much more understandable to me if it is in written form and is explained by you.

MRS. GORDON: Surely.

THE COURT: Is this the appropriate document?

THE WITNESS: Yes.

THE COURT: Let's mark it as an exhibit.

MRS. GORDON: Sure. Could we have this marked as Defendants' Exhibit DD?

xxx (Defendants' Exhibit DD was marked for identification.)

THE COURT: Will you then get Mr. Siegal to identify and describe this paper.

Q Mr. Siegal, I show you Defendants' Exhibit DD

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marked for identification and ask you if this is a table --

THE COURT: Just ask him what it is.

Q Mr. Siegal, what is this?

A Well, this is a series of numbers which represent several different things. It's basically a comparison of white, black and Hispanic total passed and sub test scored with a -- well, coming down on the page, the first set is for both white, black and Hispanics who are at Ossining.

THE COURT: Wait a minute. All I want you to do at the moment, Mr. Siegal, is describe it in a general way.

Is this a computation you made as a result of the material that was contained in Plaintiffs' Exhibit 12?

THE WITNESS: It did not come directly from 12 since 12 only has the total test scores. It came from data that we had which indicated individual sub test scores for individual candidates. It is all part of the same.

THE COURT: It is a sheet that you prepared?

THE WITNESS: Yes.

THE COURT: And you prepared it personally from the other official records?

THE WITNESS: Yes, from information that we got out of the computer.

THE COURT: And it deals with the question of black, white and Hispanic test and sub test scores at

Ossining?

THE WITNESS: Ossining, Greenhaven, all other facilities and total differences for the total groups.

THE COURT: I think it ought to be in evidence. Is there any objection?

MR. BALLER: It will be received in evidence. Then you can question about it.

(Defendants' Exhibit DD was received in evidence.)

THE COURT: Now if you want to go ahead and question about it, all right.

MRS. GORDON: I will. I want to get one clarification first.

BY MRS. GORDON:

Q Mr. Siegal, I am planning to ask you about passing rates and sub test scores. Do passing rates appear on here?

A No, they don't.

Q So that would be something separate from this exhibit?

A Yes. Just for the information of everyone here, the information on passing rates can be obtained from the displays, Plaintiffs' Exhibit 12.

THE COURT: All right, go ahead, Mrs. Gordon.

Q Now, on the basis of your statistical analysis

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and certainly you can refer to this Exhibit DD, if you wish to, would you tell us whether or not there were any significant differences in the passing rates of blacks and whites at Ossining in the total test?

THE COURT: Before you do that, I would like to have you explain this exhibit to me a little more in detail. Most of it I understand. Total passed means on all of the questions?

THE WITNESS: That's correct.

THE COURT: Then each sub head means on that particular sub test?

THE WITNESS: That's correct.

THE COURT: On the right hand, Ossining and so on is the facility?

THE WITNESS: Right.

THE COURT: At the top, white, black and Hispanic is self explanatory. What about N?

THE WITNESS: N is the number of people who fall in that category.

THE COURT: I understand. X?

THE WITNESS: X bar is the mean score, either on the sub test or total test for that group, the average score.

THE COURT: I don't want to be technical but mean

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or average?

THE WITNESS: Same thing.

THE COURT: Is it always?

THE WITNESS: The mean is the average.

THE COURT: I thought the mean was the middle.

MRS. GORDON: That is the median. I made the same mistake.

THE COURT: S?

THE WITNESS: That is the standard deviation for that group.

THE COURT: What is that derived from?

THE WITNESS: It is derived from the scores themselves. It gives an indication of the spread of the scores for those candidates.

THE COURT: I see under black and Hispanic you have two other columns.

THE WITNESS: That's right. The first column labeled W/BT is the black-white difference and the T is a value of a T statistic that is calculated based on the difference between these two groups. It uses all of the information in there, both the number of people involved, the mean score and the standard deviation for each group.

THE COURT: And the W/B?

THE WITNESS: The white-black, whether the

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difference between the two groups is significant and at what level.

THE COURT: Do you want to ask questions about what that proves or doesn't prove?

MRS. GORDON: Yes, your Honor.

Q Were the passing rates at Ossining between white and black candidates significantly statistically different, in your opinion?

A Again, that cannot be gotten from this particular sheet. That is from the original displays and based on that information, yes, the difference in passing rates was statistically significantly different.

Q What about the total mean score?

A Yes, that was also significantly different.

Q And how about the sub test scores?

A Well, for individual sub tests, the law sub test showed no significant difference between the two groups. However, the other sub tests did show significant differences.

THE COURT: That's indicated by this NS, is it?

THE WITNESS: That's right.

Q And whenever there is a number or, putting it a different way, when it does not say NS is when the difference is significant?

A That's correct.

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Q Did you make the same comparison at Ossining for whites and Hispanics?

A Yes, I did.

Q Would you tell us what the results of that are?

A In the overall passing rate I found that the differences were not significant.

THE COURT: Passing rate?

THE WITNESS: Yes.

THE COURT: That doesn't appear here, though?

THE WITNESS: No.

Q And how about the total mean score?

A That was significantly different.

Q And the sub test scores?

A Two sub tests show significant differences. That was the method sub test and the supervision sub test. The other three sub tests showed no significant difference.

Q I am sorry. Again this isn't my field.

Is there some explanation for the passing rates being not statistically significant and for the total mean score being statistically significant in the Hispanic-white comparison?

A Well, in comparing the total test score, there is no cut-off. You don't break apart this group in any way. With the passing rates you do, obviously using a cut-off

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score for the test, which means that you might arbitrarily have one individual in this upper group as opposed to the failing group. As a result, especially with small numbers of people, a difference of one or two cases could produce a very large change in the passing rate where it wouldn't materially affect the average score.

Q Now, did you do the same type of comparison for Greenhaven?

A I did a comparison for blacks and whites. I did not do one for whites and Hispanics since there was only one Hispanic at Greenhaven and that would prevent us from doing T test.

Q What did you find with respect to the passing rates at Greenhaven as between blacks and whites?

A I found no significant difference between passing rates between blacks and whites at Greenhaven.

Q Is this on the total test?

A This is passing rates between the two groups.

THE COURT: And therefore that means the whole test?

THE WITNESS: Right. I am sorry.

Q How about with respect to total mean scores?

A Yes, there was a significant difference.

Q And how about the sub test scores?

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A No sub tests showed any significant difference between the whites and blacks at Greenhaven.

THE COURT: That is a little confusing to me. I can understand the difference between passing and mean, but I am a little surprised there was a significant difference. As to the mean I see there wasn't, no difference as to the sub tests.

Can you explain that to me?

THE WITNESS: I am not sure that I can.

THE COURT: I am not trying to paint you into a corner.

THE WITNESS: I realize that. The thing is the total test is a composite score. Small differences might exist within sub tests and therefore not show any significant difference on that level. When all combined together might produce a different set that can be shown to be significant.

THE COURT: I see that the total difference with regard to the mean at Greenhaven was .01, which I assume although significant is nevertheless a small difference, is that right?

THE WITNESS: No, actually. The numbers refer to -- if we say .01, we are saying that these differences would occur by chance only one time out of 100. If it's .05, it means it would occur five times out of 100. It is

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not a computation of the actual difference between two scores but the probability of such a difference occurring. In general, the smaller the number, all right, the greater the difference or the greater the chance of it being statistically significant.

THE COURT: I was right except that I was wrong.

Q Mr. Siegal, I note on Defendants' Exhibit DD that you have a segment that says "Facilities." You noted previously in your testimony that the statistical differences between white performance or among white performance on a facility basis led you to look further with respect to Ossining and Greenhaven in terms of the operation of the test within that facility.

Why did you compute the facilities segment of Exhibit DD?

THE COURT: It says "other facilities".

MRS. GORDON: Right.

Q The other facilities segment.

A There are two things working here. Number one is I certainly don't want to disregard the other minority group candidates who are at the other facilities. However, since in general there are only one or two at these other facilities, it's difficult if not impossible to perform tests of differences between the two groups.

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THE COURT: You mean you don't have a large enough sample?

THE WITNESS: Right. The other thing is I did this just for my own information, too, the fact that Ossining and Greenhaven have generally lower scores on total test and on sub tests as compared to the rest of the whites, let's say. I would expect, therefore, that the rest of the whites at all the other facilities would have average scores that are higher. O.K. I am taking a group that appeared to have performed, well, poorly on the test, let's say.

I want to see if I find the same thing for the blacks and Hispanics, whether the people at other facilities perform better in comparison to other people in their own ethnic group, other people at other facilities than Ossining and Greenhaven perform better.

I know the mean score for the whites is going to be better at these places. If the score for blacks and Hispanics at other facilities is the same as for the blacks and Hispanics at Ossining and Greenhaven, I would expect larger differences between the two groups and therefore I should be able to find significantly different results there on a comparison between all the whites at other facilities against the blacks at other facilities or Hispanics at other facilities.

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Q What result did you find in terms of passing rates, total mean and sub test scores, actually mean scores?

A Well, for passing rates for blacks versus whites it was not significant. There was no significant difference. In terms of total test mean scores the difference was significant. On the sub test level the only sub test that showed a significant difference was the report preparation sub test.

THE COURT: As it is marked here, I don't see any difference on that either.

THE WITNESS: This is for blacks. The middle column, is that what you are looking at?

THE COURT: The middle column, right.

Q Now, Mr. Siegal, what advantages, if any, are there to looking at the mean sub test score as compared to, let's say, the passing rate of the total test or the total test mean score?

A Well, we prepare an examination on the basis of sub tests. We design sub tests to do certain things and if we are going to analyze an examination for, say, difference between ethnic groups as we do, and we would want to find out where these differences are occurring, find out what sub tests are, say, causing these differences, so it would certainly make sense to look at the examination

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on a sub test level as well as an item level, which we do.

Q Now, as I understand it, in terms of establishing the final score on the total examination, that is a composite score, is that correct?

A That's correct. The scores for each sub test for an individual added together give him a total test score.

Q And are passing rates a reflection of the composite score?

A Well, the cutoff point in determing who passes and fails is based on a person's total test score.

Q In comparing performances on a sub test level, is it appropriate to use a total score or mean score?

A It is a straight composite. Therefore, if we wanted to compare sort of passing rates for sub tests we would have to set some sort of arbitrary point and we would have to say seven, eight or ten, something like that, but it would have to be arbitrary because the only cutoff that we use in the process is based on the total test score.

Q Would you define the term "statistically significant"?

A Again, when we say something is statistically significant, and when I use the term, I am saying that something has occurred which would occur purely by chance

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only five times out of a hundred or less.

Q Is the .05 level the professional rule of thumb, so to speak?

A Generally speaking, yes.

Q What type of statistical method did you use in making the comparisons you just elaborated?

A Well, for the differences between total test and sub test means, I used the ~~t~~ f statistic and for passing rates I did both ~~high scores~~ chi square (χ^2) and ~~t~~.

THE COURT: Am I supposed to understand what that means?

MRS. GORDON: No, your Honor. I just thought it was appropriate to allow the witness to testify to what methods he used.

Off the record.

(Discussion off the record.)

THE COURT: I suppose if there is a dispute among the experts as to whether that is the right way to do it I will have to learn about it.

MRS. GORDON: In that case, the text book which wasn't complete will help you a lot. It gives an outline of the course.

Q Prior to reaching the events in the examination process, namely, the process for 34944, could you please

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tell -- by the way, what time do you see the significant events in that examination process starting from, appoximately?

A I am not sure I understand the question, but certainly from the date of the request for the examination, although we had been -- I personally had been doing other things in the corrections field with corrections examinations prior to that point.

Q That is what I want to know, Mr. Siegal. What experience had you had prior to your actually undertaking the preparation of 34944, particularly in the correction officer series?

A Well, I had prepared other examinations in the field on the state level, the 1972 correction officer exam, the 1972 correction captain examination, and also a local correction exam for various localities in New York State, 1972.

THE COURT: In correction?

THE WITNESS: Yes.

A In addition, we had been doing some preliminary work on the correction officer series. This is in anticipation to a proposed IPA grant from the federal government. And we had been doing -- I and two other people, one fellow is from the classification compensation division, one fellow

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from staffing services and myself as an examiner, had been working on studying the positions of correction officer and working up a variety of materials relating to it both on an examination level and on a selection process and things along these lines.

Q I believe the record indicates that there was a scope conference on June 1st of 1972. I am referring specifically to prior to that conference and asking you what documents and what specific references to the correction officer series you had other than in terms of preparing examinations or the ones you just mentioned.

A Well, other than the sergeant examination or things that were involved in that, I have in line with this preparation for the IPA project -- we had visited Coxsackie Correctional Facility, we had read the job audits for the correction officer series.

Q Excuse me. When you say job audits, do you mean Defendants' Exhibit E? I believe it was placed in evidence on plaintiffs' case.

MR. BALLER: I think that is incorrect. It was identified but not in evidence.

MRS. GORDON: I am sorry. I thought it was placed in evidence.

THE COURT: Is that what you are referring to?

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THE WITNESS: That is at least a portion of the things. I am not sure. We had three looseleaf volumes.

THE COURT: That is the kind of material?

THE WITNESS: That is correct.

MRS. GORDON: At this time I move Defendants' Exhibit E in evidence.

MR. BALLER: Again subject to our cross examination, We would like to show that has to do with the job of correction officer rather than correction sergeant, and it is only relevant to the job of correction officer, and we have no objection.

THE COURT: It is put in at the moment, as I understand it, for me to know some of the materials that Mr. Siegal considered. He may have considered the wrong material but at least it is proof of what he considered.

MR. BALLER: There is no objection to its use for that purpose.

MRS. GORDON: That is the purpose. I would call the court's attention to the fact that the job audit or survey materials, the title indicated on them is "Occupational survey of correction officer and related classes, Matteawan State Hospital, Beacon State Institution, Narcotic Rehabilitation Center at Matteawan."

(Defendants' Exhibit E received in evidence.)

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Q Had you visited the training academy?

A Yes, we had visited the training academy as an additional trip. I have also read and had been reading a variety of other either texts or training manuals, guides and things like that in the field. I don't know if I have mentioned them all before.

In the process of visiting these places, it should be pointed out we talked to people presently working in the field, we talked to people who had been working in the field, an entry level, supervisory positions and so on.

Q Just with respect to this one set of documents, Defendants' Exhibit E, did you find that helpful to you? I am talking in terms now prior to June 1st of 1972.

A This is in relationship to the sergeant examination?

Q Yes.

A Well, at the time that I first read it, there had been no request for the sergeant examination. When I received -- when we received a request for that examination and during the process of developing that examination, we of course referred to the relevant sections of those audits and they were useful.

Q Did you also consult the class specifications for the title, Plaintiffs' Exhibit 4 in evidence?

A Yes.

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Q Had you consulted those prior to June 1st of 1972?

A Yes.

Q By the way, is this document, the class specification, is that drawn up by the personnel examiner, that is, individuals like you who draw up the actual examination?

A No, it's drawn up by people who work in the classification and compensation division of our department.

Q To your knowledge, have there been any changes in the class specifications particularly in terms of the officer or sergeant positions, either separately or in relation to each other, in the last year or so that you have been in the department, prior to June, '72?

A Well, the class specifications are updated at different times based on new information, new audits, and so on. I think the one you have is the latest one, which is, I guess, March, '72. There was one in March, '71, I believe, and there was some increased emphasis in the specifications as to the responsibilities, for instance, of the correction officer with regard to day-to-day counseling and rehabilitation of inmates.

Q I show you --

MRS. GORDON: I call the court's attention to Plaintiffs' Exhibit 6, which is dated December, 1972, and

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certainly the exhibit speaks for itself. Just to characterize it for a moment, it appears to be a memorandum from Mr. Galvin to his people describing how to write a class specification.

THE COURT: Who is Mr. Galvin?

Q Who is Mr. Galvin?

A He is presently the head of the classification and compensation division.

Q Now, I note that in Plaintiffs' Exhibit 6 , there Mr. Galvin doesn't state that the class specifications are supposed to have on them K, S and A.

First, would you please tell us what K, S and A means and then tell us whose responsibility it is within the context that you work in.

A Well, K, S and A stands for knowledges skills and abilities, generally in reference to either a job or a series of jobs or class structure, or something like that. They are not included in the class specifications. The K, S and As are prepared by an examiner generally prior to and during the preparation of an examination for either a title or a series , or something of that sort.

Q Before turning again to the exact events of the examination, I assume there is a threshhold question here and that is: What is the purpose of examination 34944

and examinations like it, in your opinion?

A The exam is designed to select a pool of individuals who are better or best qualified to perform the jobs of correction sergeant.

Q Does that operate within a given candidate pool?

A It has to be -- in Civil Service we are talking about competitive testing. It means a person must be qualified in some way to compete, he must decide himself to take an examination. So certainly we can only select from those people who decide to take the exam and shoot for this job.

Q We had some discussion earlier today here about establishing the cutoff point of the examination.

Is there any Civil Service regulation or rule which requires -- which sets the maximum of -- strike that.

What are the Civil Service rules, if there are any, in terms of establishing a cutoff point?

A The highest pass point that we can set must be equal to 70 per cent of the items that are included in the test. It can be set lower than that, but, for instance, in no way can we decide that a person must get 80 per cent of the items correct in order to pass the test. Anybody who gets 70 per cent of the items correct or more must automatically pass that examination.

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Q In terms of how things ultimately --

THE COURT: That is 70 per cent of the different items regardless of what weight may be attributed to different items, is that right? I guess in this case there were not different weights attributed to different items.

THE WITNESS: Correct.

THE COURT: If you have a hundred questions in this examination, then anybody who got 70 of them right would have to be passed, is that correct?

THE WITNESS: That's correct.

Q In terms of what ultimately resulted from this examination, was the cutoff score placed at 70 per cent of the material?

A Yes, it was.

Q Is that the highest it can be placed at or the lowest? Is that the lowest it can be placed at in terms of the -- I am sorry. Strike that. I get confused.

Would you explain that to us, please?

A It is the highest -- we pass the smallest number of people that is possible. All right?

Q Thank you.

A Legally possible.

THE COURT: Were you in on the decision as to what would be the passing grade?

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THE WITNESS: Yes.

THE COURT: Why was it decided to make it 70 per cent or 30 per cent or whichever way you look at it?

THE WITNESS: The way it would work in general is that you would take a look at the group --

THE COURT: I am really not interested how it would work in general. I want to know why the people who decided it in this case decided it the way they did.

THE WITNESS: We look at the number of people who passed at this maximum possible score. We then take a look at the characteristics of that group: for instance, total number of people, the location of those people in general with respect to the present vacancies and expected vacancies for the department.

In other words, at the passing score we had approximately 400 and some odd people. It might normally be expected -- we had something like, I guess it was, 80 some odd provisionals. Those appointments would automatically be made, and then expect, say, a hundred or some odd over the course of the next two years.

In addition, we looked at people who may have taken both a sergeant's exam and a higher level exam or different exams. They may have taken two exams and passed them, in which case they might be expected to take another

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position. We looked at the number of people we could expect to be able to appoint over the life of the list with respect to a total number of people who were on the list.

It was felt at that time that the number who had passed at the test point of 53 was sufficient to meet the needs of the department and in order for us to go below that level we must justify it in some way, and there was no -- all the evidence and all --

THE COURT: Did you say the pass point was 53?

THE WITNESS: Yes.

THE COURT: Is that what was the pass point?

THE WITNESS: Yes.

THE COURT: The raw score pass point?

THE WITNESS: Yes, the raw score 53; of the 53 questions, correct.

THE COURT: Out of how many?

THE WITNESS: Seventy-five.

THE COURT: That is not a percentage figure?

THE WITNESS: 53 would be the score that corresponds to 70 per cent of those items, but the final ratings, and things like that, are not percentages per se.

BY MRS. GORDON:

Q Now turning to the examination itself, the record reflects in Plaintiffs' Exhibit 9 that a meeting was held

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on June 1, 1972. What type of meeting was this and why was it called?

A Well, it's generally called a scope conference, and it's called generally soon after a request for an examination has come into our department.

You want me to talk about --

THE COURT: I understand from Mr. Taylor's testimony that a scope conference involves what you would expect it to if you thought about it, which I never did before, which is that the people who are going to design an exam sit down and decide what is going to be in an exam.

THE WITNESS: It is not just the people who are preparing the examination. With the people from the agency, with other people from our department, to discuss in general the general topics for the test as well as other things such as who will qualify, and so on.

THE COURT: The way it occurred, Corrections came to you and said, "We want an exam." You said, "O.K., let's sit down and decide what should be in the exam"?

THE WITNESS: Right, plus other things attached to it.

THE COURT: Like what?

THE WITNESS: In this case, it was not just a

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request for correction sergeant. It was also a request for a correction lieutenant examination.

THE COURT: I understand. Insofar as we are talking about sergeants, the process is the same?

THE WITNESS: We are talking about who was eligible to take the test, which might be open to question at some point.

Q Could you tell us who was present at that meeting, if you recall, and what agency they represented?

A As far as I remember, Mr. Henry Bankhead and Bill Nevins.

THE COURT: Who is he?

THE WITNESS: Bill Nevins I believe at that time was either working in the personnel department for Corrections or was working for Commissioner Quick, or in that section.

THE COURT: Anyway, he was from Corrections?

THE WITNESS: Yes. And from the Civil Service Department, Don Etter, Bill O'Grady, myself, of course, and there were two other people, Herb Steele and Jerry Durovic.

Q Just tell me briefly, so we get it briefly in alignment, what were they called upon to decide, if anything, at this meeting?

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A We just discussed several different things. One was what positions will be tested for, who would be eligible to take those examinations, when the examination would be given, what the scope of the examination would be. I think that is casically what was covered.

Q Was the scope actually agreed upon at that June 1st meeting? By "scope" I mean the five areas: laws, methods, etc.

A The scope was decided upon. However, in all of these things there is a review process by the operating agency and the examiners, whereby after a meeting such as this, a tentative announcement is written up including all the things on there, such as minimum qualifications, who is going to take it, when it will be given, scope, and so on. These things are sent to the people who attended the meeting, the responsible examiner and the operating agency. And there can be changes made in any of these things up and to that point.

Q Did you agree with the scope as it was determined at that time?

A Yes, I did.

Q In reaching your judgment, what reliance did you place, if any, on the scopes of past sergeant examinations?

A Well, certainly quite a bit. I had looked at

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previous examinations and materials in our files, and it certainly was input into my thought processes.

Q What exactly is the basis for an examiner looking at past scopes or, indeed, at past examinations?

A Of course, previous examinations are the tools that have been used in the past to select out groups of candidates, select out a pool. These are the people in general who are appointed to positions.

The operating agency knows in some general way, at least, how people are performing on the job. They can be satisfied with the pool of candidates we have been giving them or they may not be satisfied. They provide input as to maybe how they are not satisfied, and so on.

So certainly with this feedback from the agencies we get an indication as to how successful examations have been. If they are working all right, then we have some confidence in the types of scopes in previous examinations we have been giving.

Q Now, as a result of that conference, was the scope -- by that I mean the five descriptive areas -- for examination 34944 to be the same as the description of the areas covered in the prior sergeant examination, for example, the 1970 examination?

A No, it was not

Q What change was made?

A We had previously had a sub test in reading comprehension or understanding and interpreting written material. This was removed and was replaced by the topic of preparing written material, report preparation.

Q Was that because people felt that understanding and interpreting written material was not appropriate for sergeants' jobs?

A It wasn't a question of not being appropriate.

Q What was it, then?

A However, the report preparation material, as we were discussing at this meeting, was certainly more appropriate for the position of sergeant, more closely related to the actual job duties and tasks of the sergeant.

In addition, we had some input as to how this material had worked in other areas, for instance, in the police area. It seems to be working pretty well, and we felt that it would be appropriate for this position.

Q While we mentioned the 1970 examination, could you tell me were the questions on the '72 sergeant's examination the same or different from the questions on the 1970 examination?

A They were completely different questions.

Q I take it from what you said previously the scope

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was similar except for the report preparation section?

A That's correct.

Q In view of those differences, could you conclude whether or not these examinations worked the same way on the two candidate pools who were involved, the '70 pool and the '72 pool?

A There are certainly certain similarities between the two but they are not testing for all of the same things certainly. The job has changed, the tests have changed, and we wouldn't expect them to work exactly in the same fashion, no.

THE COURT: I don't suppose if you gave an examination two weeks apart to the same people they would be exactly the same.

THE WITNESS: Generally speaking, no.

Q What I am asking is, given the different nature of the complete difference between the questions on the '70 exam and on the '72 examination, would you say that although the format, the areas covered were similar except, as you said, in the report preparation, I simply want to ask you whether or not these could be considered under any kind of professional standard to be the same examination?

A No, they are not the same examination at all.

MRS. GORDON: I would like the record to indicate

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that Plaintiffs' Exhibit 17 --

Q I show you Plaintiffs' Exhibit 17, page 2, and ask you whether or not the box marked scope with the X's inthe column represent the scope as it was determined at that June 1st meeting and finally approved?

A Yes, it does.

Q Looking at Plaintiffs' Exhibit 17, one can't help but notice that the scope of the lieutenant's examination, which is also announced on Exhibit 17, appears to be similar to the scope of the sergeant's examinations.

Would you just briefly tell us what the actual differences are in the scope?

THE COURT: Aren't they visible?

MRS. GORDON: All right.

THE COURT: We talked about it before. There is nothing on supervision and there is something on administrative supervision.

THE WITNESS: That is correct.

THE COURT: That is in regard to the 945 as distinct from 944.

Q In noting that the scopes are similar, does that mean that the questions in those sub test areas are the same?

A It wouldn't necessarily mean that, but in this

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case certain of the questions that were used on the sergeant's examination were also used on the lieutenant's examination. In particular, the 15 questions on laws, rules and regulations were identical for both groups. The judgment questions were identical for both groups. In the methods questions, the sergeants received 15 questions, the lieutenants took the same 15 questions and also took an additional 15 questions, in that particular area. In supervision versus administrative supervision, obviously there were two completely sub tests. In the report preparation material, the lieutenant's examination was of a higher difficulty level than that on the sergeant's exam.

Q What rationale, if any, is there for using the same questions on the laws and methods and judgment sections on both the sergeant's and the lieutenant's exam?

A Well, certainly there are basic similarities in many of the tasks that sergeants and lieutenants have to do. They are working primarily -- they are working in the same facilities, working with the same general people. The differences seem to occur primarily in terms of responsibility, scope of operations and things like that.

THE COURT: Can't we say this anyway, that if the knowledge of laws, rules and reulations is relevant to the job it is the same laws, rules and regulations regardless of the job?

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THE WITNESS: That is correct.

Q Turning now to the scope conference, it appears from Plaintiffs' Exhibit 9, the June 2nd memorandum, that it was considered or determined at the scope conference that six months of qualifying experience would enable a correction officer to take the sergeant's examination and then in order to get appointed he would have to wait at least two years.

In this connection, was that determined at the scope conference?

A Well, I would say it was suggested but it certainly was not a final determination,by any means. This was a particular item which was going to be checked out through the Department of Correctional Services prior to even the production of a tenative announcement, in other words, this was something that was discussed, some people agreed with this, it was taken back to Correctional Services and within I think it was about a week or so they sent back and said no, they wouldn't go along with that.

Q By the way, as a participant in the scope conference, were you in agreement with the suggestion that the qualifying experience requirement be lowered, let's say, to six months?

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A I personally think that six months is too short a period of time.

Q Is the final determination with respect to the qualifying experience requirement as set forth in Plaintiffs' Exhibit 17, the notice of examination, in the box in the notice of examination?

A It's true to the extent that there is an amendment to the announcement. I would say if you refer to the amendment to the announcement that would be correct.

THE COURT: Which exhibit are you looking at?

THE WITNESS: This is 17, Plaintiffs' Exhibit 17.

THE COURT: Where is the amendment?

THE WITNESS: Third page.

THE COURT: This exhibit doesn't have a third page. Can I see your copy?

THE WITNESS: Certainly. (Handing)

MRS.GORDON: Off the record.

Is the amendment on the judge's copy?

THE WITNESS: No.

THE COURT: Can you tell me what the amendment was?

THE WITNESS: The amendment referred to the experience necessary to take the sergeant's examination. It says now that for appointment to the position you needed three

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years of combined experience in these titles.

Q By the way, in the amendment you referred to, was that a typographical error?

A There was in the first line a typographical error, yes. It should be pointed out, too, that the qualifications, although they were not set up along the six month line, were different than in previous examination. Whereas before you needed three years of experience in order to even take the exam and three years for appointment, it was reduced slightly to two years to take and three years for appointment.

THE COURT: Right.

Q Now, you noted earlier that you had a change in titles during the course of the -- you were first assigned to the examination. From and after July of 1972, did you have full responsibility for this examination?

A Well, I certainly had responsibility for it. As in any institution such as Civil Service, you are always reporting to other people and certainly I had supervisors.

Q Was Mr. Taylor your supervisor?

A Yes, he was.

THE COURT: I take it you had less supervisors after July 2nd than before?

THE WITNESS: That's correct.

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Q Who was your supervisor in June of 1972?

THE COURT: Can I ask a nasty question? What difference does it make? He is in charge of the exam between him and Mr. Taylor. If they don't know, we will have to give up.

MRS. GORDON: Quite clear. I wasn't planning to call the supervisor.

Q As you developed the examination itself, could you have changed the scope of the exam during that process if you had found you had made an error or the original decision was wrong?

A It can be changed, yes. Certainly there are practical considerations such as -- especially in this case we are working in a small time frame. If you come up with a completely new element of the scope, you have to prepare items for it. You certainly must give consideration to the candidates themselves. They need time to prepare for the examination, to be notified of the examination.

After a certain point is reached, certainly if you want to change the scope or something like that, you would most likely have to postpone the test and put it off for a period of time.

Q Are you aware whether or not such action has been taken in your department?

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A Well, I personally don't recall having done it myself. However, fairly recently, as a matter of fact, an examination was postponed for a reason along those lines.

Examinations also have been postponed for other reasons of one sort or another.

Q Was that an examination in the correction series that was postponed?

A There was an examination for I believe it was correction captain and some higher level titles that had been postponed back, I believe, in late '71.

The examination that was postponed recently in our department in relationship to scope was something in the campus security series.

Q You mentioned you had visited Coxsackie prior to the time you went to the scope conference. Had you visited any other institutions or facilities up until, let's say, July, the end of July of 1972?

A Well, on or about July or perhaps in August of '72 we also visited the Matteawan Facility, which includes several different institutions.

Q In these facility visits, were you alone or were there other people in your group who went with you?

A Well, on the initial Coxsackie visit I went with two other people who were working on this committee with me,

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as I mentioned before.

In Matteawan, we had people who were from the Corrections Department who were helping us write the exam. They went with us,and also another individual who worked in our department who was writing questions for the hospital series,as well as a member of then the IPA group, Mrs. Elaine Walter.

Q By the way, when you went to Matteawan, was that with principal reference to the hospital series that you were also doing?

A Yes, certainly our major focus at that point was at Matteawan.

Q Do they have correction officer positions at Matteawan?

A Yes, but not correction sergeant positions. We were testing for hospital titles, and those positions are only located at Matteawan.

Q These people who went with you, you mentioned Mrs. Walter was there. Anybody else who went with you?

A No, not at that time. There was another individual who later joined our IPA group, Jim Bouldin. He was not with the group at that time. However, a short time after he arrived he did go on a trip with some other people from Matteawan and did see the facility at that

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point.

THE COURT: I am sort of interested in this, but we are pressed for time. It seems to me that the question that Mr. Siegal could be most helpful about would be the actual construction of the examination or discussion of the examination itself. He might have talked to Albert Einstein, but it is the exam itself that counts.

MRS. GORDON: I think the next question will establish the nexus between these individuals and the examination.

Q Did these individuals you mentioned assist in constructing examination 34944?

A Well, certainly Mrs. Walter played a role in preparing individual items and attending the conferences with the representatives from Corrections. Mr. Bouldin joined the team late, but he did provide some input and did attend some conferences and, as I mentioned, on the Matteawan visit the individual who went from our department and wrote questions for the hospital series.

THE COURT: Perhaps I should refine my remarks. That is the question whether the state takes the position that the degree of care with which the examination is prepared is relevant. In my view of the case, and I may be wrong, the degree of care is not relevant, it is a

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question of what ended up in the exam. He may have been the most careful man in the world and done a poor job from the point of view of what we are talking about, or he may have been a careless man who ended up with a great job.

I wonder what the state's position is on that.

MRS. GORDON: Frankly, I haven't considered the question on degree of care. I am not eliciting this testimony to show the degree of care that Mr. Siegal took or the other people took.

THE COURT: Then I don't understand what it is being introduced for.

MRS. GORDON: The question is whether there was a job analysis. We view a job analysis to be, in effect, that process by which the examiner learns about what the duties of the job are and he elaborates them in the test construction process.

That's why we feel it is critical to show what Mr. Siegal's knowledge of the job was and how he obtained it.

THE COURT: I am glad to know that, and maybe you are right or maybe the plaintiffs are right. Thinking it through, it doesn't seem to me at this moment to make an awful lot of difference as to whether you flipped a coin in coming to the examination itself. It would seem to me

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that it ought to be what the examination ended up to be.

But I will review the cases having this point in mind.

MRS. GORDON: Maybe I can clarify it a little further, your Honor.

One of the critical issues, it would seem to me, is what K, S and A's were generated and how does one determine what is appropriate. Our argument is based in major part on the fact that the content validation process itself is one based on the informed judgment of the participants and, therefore, how they come to know what the role of the sergeant is and how they elaborate their K, S and A's in their questions that role --

THE COURT: In order to render an opinion that the examination is valid from any point of view, you have to show that they know enough about the subject to be able to render an opinion. Yes, that I agree with.

MRS. GORDON: And how they came to know it. For example, if it were merely from documents such as the occupational survey or whether or not it was the document plus input from actual visits, that type of thing, that is the main thrust of our case, your Honor.

THE COURT: Unless the plaintiffs feel that Mr. Siegal hasn't been qualified on that point, I am satisfied

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that he has and I would like to go on to something else.

MRS. GORDON: I think the plaintiffs take issue with that.

MR. BALLER: We take issue with the apparent position of the defendants that there was an adequate job analysis. We do not take any issue with the fact Mr. Siegal did all the things he has been testifying about and would continue to. We just don't think that constitutes a job analysis. I think --

MRS. GORDON: And we do.

THE COURT: Do you think there is a legal obligation to conduct a job analysis or simply the failure to do so is evidence that the court should consider in whether or not the examination actually is job related? Supposing by chance some idiot put together a job related examination. Wouldn't that pass muster?

MR. BALLER: Certainly, if that were validated by a criterion related method.

Our position is that to reliably validate an examination by the content validation method you have to have a job analysis, and there isn't one here.

MRS. GORDON: Your Honor, I think you see the point.

THE COURT: I see your position now.

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BY MRS. GORDON:

Q In the context of your visits to these facilities and other facilities, if you went there, what do you look for?

A In particular for the sergeant, we look for what he does and why he does it, how he does it, the relative amounts of time he works on these things and the results of his actions;and the way you get at this is both by viewing the people doing those jobs, by talking to them, by talking to supervisors of those individuals,people who work below them, and so on.

Q Did you in fact do what you just described?

A Well, this is certainly what we did at Coxsackie. In addition, outside of the specific institutions themselves, we had talked to people who had either been in these positions or were in these positions and various other places.

THE COURT: How much time did you spend at Coxsackie?

THE WITNESS: We spent a full day at Coxsackie.

THE COURT: How much of that time would you say you were conferring with sergeants personally?

THE WITNESS: Conferring with sergeants personally? Fifteen, twenty per cent of the time. It was sergeants and their supervisors and certainly officers.

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THE COURT: Does that mean about an hour or two with sergeants?

THE WITNESS: Something like that.

THE COURT: You weren't there 24 hours?

THE WITNESS: Correct.

Q Did you have on that point, Mr. Siegal, occasion to visit other facilities after examination 34944 was developed?

A Yes. We returned to Coxsackie at one point and reviewed our work there, and I personally visited Ossining and I, along with my group, have visited Auburn.

Q Did you find anything at Ossining or Auburn to lead you to believe that your observations earlier at Coxsackie prior to the time you developed 34944 were erroneous?

A No.

THE COURT: Was your return to Coxsackie and these other trips after you had developed 34944 before 34944 became final or after it became final?

THE WITNESS: Let's see. It may have been after the establishment of the list. I don't remember the exact dates of all the visits. We were involved --

THE COURT: You didn't go there for the purpose of determining whether you should alter 34944?

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THE WITNESS: No. We were involved in the IPA --

THE COURT: I take it what Mrs. Gordon is trying to bring out is that although that didn't occur before 34944 was final, your later experience had in your mind confirmed your earlier views.

THE WITNESS: That's correct.

Q Turning to the construction of the examination itself, in addition to your own observations, from the matters you have just elaborated to the court, did you have any assistance, any other assistance, in constructing the examination? And I refer specifically to the three sub tests, the law sub test, practices and judgment.

A Other than the people who were working on the IPA committed with me, we had three individuals from the Department of Correctional Services who assisted us in the preparation of those sub tests.

THE COURT: What is IPA?

THE WITNESS: Inter-governmental Personnel Act. It's a federal program for providing monies to localities or states, or something like that, for a variety of different types of research or studies, or something like that.

THE COURT: And there were people whose jobs were funded?

THE WITNESS: My job at the present time at the

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Civil Service is funded. We have received a grant to do a method study, that I know about.

THE COURT: In the last analysis, were there Civil Service people, whether funded by IPA or not, and Corrections people who worked out this examination or was there a third category?

THE WITNESS: These were Civil Service employees.

Q Who were the corrections people?

A Specifically, David Harris, Bill Ciuros and Hy Sperbeck.

Q What positions did they hold with Correctional Services?

A Well, they were primarily line people. At that time I believe they were all lieutenants, they were all on the captain's list and were about to be appointed, or had just been appointed to the position of captain.

Q I am obliged to ask you whether any one of those people from Corrections was a minority group member as we understand it in the context of this case.

A David Harris is black.

Q With respect to these three sub tests, the laws, rules and regulations, methods, sub tests, and the judgment sub test, in your opinion what were these sub tests intended to do and how were they created?

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A Well, each of those sub tests was designed to measure a certain set of knowledges, skills and abilities related to the job of, in this case, correction sergeant. That is what they were designed to do.

Q What process didyou go through in creating the sub test description?

A Well, aside from the work that we ourselves had done in terms of finding out about the job and looking at previous examinations and so on, we sat down with the people in this group initially and discussed with them further the information that they had about the job itself, the types of things that are important, what should we test for, and things like that.

THE COURT: You asked the three Corrections people?

THE WITNESS: That's right. We sat down and discussed the positions themselves.

THE COURT: I take it that you don't know much about correctional law itself or at least you haven't made a particular study of it.

THE WITNESS: I just want to say that in the preparation of prior examinations such as the correction captain exam, I had certainly read the correctional laws, the sections that related to the position of captain.

THE COURT: I see. But with such background as

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you had on the subject, and I didn't mean to criticize you for not having a thorough knowledge -- you can't -- are you saying, for example, that you would ask these lieutenants or captains, "What laws and regulations do you think we should ask about and what questions would you suggest on such a subject?" Or did you take all the exams and look at all the questions? How does one go about, out of thousands of things that could be asked, deciding what 15 you will ask?

THE WITNESS: Well, as I say, we talked about the job itself. We talked about what people do. Then the instructions I gave to these people, because I wanted as much input from them as possible, was: "Go back in your own experiences and decide what is important. Think about the problems that you have had, and so on, and prepare questions relating to these things."

Of course, they would come back with a variety of questions.

THE COURT: Did they come back with written proposals?

THE WITNESS: That's correct, typewritten or handwritten questions. And then we would sit down as a group and alook at each question and discuss it, decide whether or not it was relevant, whether or not we should use it,

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whether it was too easy, too hard, and in some cases, for instance, if we felt it was not appropriate, the question was discarded. If we felt it would be appropriate let's say on a lieutenant's level as opposed to a sergeant's level, it certainly would not be asked for the sergeants. If it was on a higher level, we might file it away for use at a later date.

THE COURT: The very first question here in Exhibit 18 was discussed before on this trial. This is a question which says:

"The superintendent of a correctional facility is appointed by which one of the following individuals or groups."

And then it gives four different possibilities. What was the reason why it was believed that it was useful for a sergeant to know that?

THE WITNESS: Well, I cannot remember specifically the comments that were made, although one thing that does seem to stick in my mind is that everybody knows that anyway and certainly you want to start off the test and people feel good after the first question.

In general, if a person is working for a department or an agency, if he can't put himself in the framework of that agency, know how people get where they are,

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certainly a fellow knows he has to take a competitive examination to be promoted within the ranks, if he doesn't know that, for instance, the superintendent gets there in a particular way, all right, I don't know that he can be as effective in his position, in his relation with other officers, with the superintendent, with inmates, what have you. I think it's important in that context.

In addition, I think in general that some questions although, for instance, in this sub test. I would say -- I would agree that they may not be specifically related to a job that a correction officer performs, say, usually. However, correction sergeants must answer the questions of correction officers, they must answer the questions of inmates. Inmates especially, let's say, are -- what is the term they use? -- like guardhouse lawyers. They know the stuff backwards and forwards. If a sergeant, a first level supervisor, can't answer questions from inmates, looks foolish or stupid or something like that, he puts himself in a box.

In addition, any question relating to a significant portion of the law, let's say, demonstrates in this situation, a testing situation, several things. Number one, that the individual who got that question right has read the law, remembers it and has been able to interpret

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it in some way.

So that if a new law is written or a section is changed, or something like that, even without specifically asking him that question we have some indication as to the fact that he would be able to read it, able to understand it and most likely able to apply it on the job.

THE COURT: Thank you. It is a very solid answer.

Are you looking at the clock as if you would like to quit?

MRS. GORDON: Yes, your Honor.

THE COURT: It is about time. If you feel it is a good breaking point, it is all right with me.

MRS. GORDON: This is certainly a suitable one.

THE COURT: I didn't want to get behind. Are we, roughly speaking, on schedule?

MRS. GORDON: When we had this problem with going over a bit this morning, I think your Honor mentioned that this would go over to Monday.

THE COURT: I said I was prepared to if necessary. I wasn't inviting it.

MRS. GORDON: I had a discussion with Mr. Baller as to when we would call our experts. I believe we are now prepared to call our expert, let us say -- of course

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depending on Mr. Baller's cross examination of Mr. Siegal, and we have at least two other witnesses --we would start Friday morning.

Is that when we will start with our expert?

MR. BALLER: We think we can finishboth experts on Friday and finish a couple of other witnesses tomorrow. I don't know whether that leaves Mrs. Gordon with somebody else to put on Monday or not.

THE COURT: I am prepared to do both. I hope it won't be all day Monday and, if lucky, none of Monday, but I have to conclude the case by Monday afternoon.

MRS. GORDON: In the framework we were operating in in terms of these five days, I am sure we will be able to finish on Monday. I just am not as convinced as Mr. Baller we can do the two experts in one day.

THE COURT: We will work at it. I don't think another six or seven minutes will make that difference, so we will adjourn for the day, then.

(Adjournment to 10:00 A.M., July 26, 1973.)

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EDWARD L. KIRKLAND, etc.

Plaintiffs, 73 Civil 1548

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, etc.

Defendants.

New York, New York
July 26, 1973
10:00 A.M.

(Trial resumed; in open court.)

MR. BALLER: Your Honor, while we are waiting, I have one small matter. I note that Plaintiffs' Exhibit 12, which is the so-called scatter diagram, the chart of scoring patterns on the 1972 sergeant examination, due to a clerical error in our office in running off the copies of this exhibit, page 5 of the exhibit was omitted from the copy admitted into evidence and from the copies supplied to you for your bench copy and to the defendants.

I would like, if it's acceptable, to amend that exhibit by inserting page 5. I think you may have two copies of page 4 instead. It's a six-page chart. Since that is already in evidence, I would like your permission to tamper with it to that extent.

THE COURT: Don't take this down.

(Discussion off the record.)

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THE COURT: Are you ready now, Mr. Baller?

MR. BALLER: Yes.

THE COURT: I have another matter that was due to commence a quarter of ten. Because of confusion in the United States attorney's office, it did not go on. When everybody is available for it I will have to interrupt this proceeding briefly.

Yes, Mrs. Gordon.

MRS. GORDON: Your Honor, before Iproceed with the examination of Mr. Siegal, I would like to note something for the record.

In our memorandum which was forwarded to the court, defendants' trial memorandum, on page 9, and, frankly, I don't believe any other place in the material submitted in this proceeding, I stated:

"Defendants will show that examination 34944 was generated through a process that is consistent with content and rational validation methods and is, therefore, a validated examination within the meaning of those terms."

Now, that sentence is obviously mine. Defendants do not contend that this examination is validated under a rational so-called model. This was my own interpretation of laws and cases and so on.

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THE COURT: Should I strike the words "and rational"?

MRS. GORDON: "And rational" and "methods" would become singular, and "terms" would be "the meaning of that term." "Rational" has some kind of unique meaning which I was not familiar with.

THE COURT: O.K. I take it it doesn't necessarily mean it is irrational.

MRS.GORDON: Exactly. When I did it I thought "rational" and "content" were the same thing, but apparently they are not.

Mr. Siegal.

K E N N E T H S I E G A L, resumed.

DIRECT EXAMINATION (CONTINUED)

BY MRS. GORDON:

Q When we closed yesterday, Mr. Siegal, we were talking about the examination itself. I would like to proceed a little further with that.

Could you tell us, what is the basic operating procedure for determining K, S and A within a sub test framework and how does that apply in examination 34944?

A Well, we start off -- a person writing an exam will start off with a basic idea of the field and will proceed to get an understanding of the tasks related to

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the job. From these, pretty much in his own mind he will then decide on the knowledges, skills and abilities related to those job tasks.

Now, in the process and during the process of doing job analysis, speaking with people in the field and so on, he will then get input in terms of the relative importance of various of these K, S and A's and will decide eventually which particular K, S and A's he is going to test for.

In addition, items will be prepared relating to each one of these K, S and A's for which he intends to test, and the K, S and A's will be organized in terms of, let's say, relatedness into sub tests.

THE COURT: Organized by whom and under what circumstances?

THE WITNESS: By the people who are constructing the test based on a consensus with those people who are helping to prepare the test, such as subject matter specialists.

Q How does he go about selecting the items for a given sub test?

A Of course, the items themselves must relate to the particular knowledges, skills and abilities that we want to test. So there has to be that kind of correspondence

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to begin with.

Looking at a sub test as a whole, we want to be sure the items taken as a group are an adequate sample from all those possible items that you could test for related to those K, S and A's.

Q Does the nature of the material affect in any way the items you can select for a given sub test?

A Well, certainly items have to be related to the K, S and A's that you are working with. Based on like the underlying nature of those K, S and A's can in some way determine both the general format of the questions themselves and certainly their content.

For instance, in a law sub test that we had, you are working with the, say, correction law, rule book and regulations that are in existence at a particular time, and there would be one other, say, source for the questions themselves. You are working with a limited field, whereas, let's say in a situation, judgment-type situation, there are such an innumerable number of possible situations and contexts that could be used as a framework for questions. Certainly you can see that you are working with, in general, pools that are different in some general way based on the things that you are trying to test for.

THE COURT: Therefore, what am I to understand

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as a result of that, that it is harder to frame questions for the latter subject than the former?

THE WITNESS: It is not necessarily harder, but, for instance, in, let's say, with the laws you are working with -- there are only certain things that you can ask. You can only ask a question or a series of questions on a particular point of the law in so many different ways without being redundant. You have a limited number of items that you can use.

With the situations you can be asking about certain knowledges, skills and abilities in several different situations or contexts.

Q In terms of a law sub test, as you mentioned, the fact that you can only sample a finite body of knowledge, does that impose any practical limitations on the use of certain kinds of items?

A Well, as I say, the type of material that you are testing will affect the scope of the questions that you are going to ask, but the practical limitations are relatively slight since there are, in most cases, a very large number of items that could be used on an examination.

Q I have a few specific questions in terms of the structure of the examination.

I think we have all noted by now that the report

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preparation sub test, that booklet 485-E, questions 46 through 60, I guess it is Plaintiffs' Exhibit 18, is phrased or is not phrased or worded in correctional terms or placed in a correctional context. Is there any reason for that?

A Well, yes, there is. The particular type of material that is used here --

THE COURT: Can I find this, please? 45 to 60?

MRS. GORDON: 46 through 60.

THE COURT: Read back the last question for me.

(Question read.)

THE COURT: I have noted it is not phrased in correctional terms of placed in a correctional context.

THE WITNESS: That's correct, there is a reason for that. This particular sub test is similar to other sub tests that have been prepared fairly recently by our staff experts. The basis for the type of question itself and the format had come from some questions that had been prepared by the educational testing service and have been shown to be related to report writing abilities.

Now, we are looking for a measure in the sub test of the skill of report preparation. Now, we have used in the past I don't know specifically which previous exams in the correction field, but we used to use material

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that was in the context of a correctional setting. It was in the form of, let's say, a report and it described an incident, let's say, that supposedly took place in a facility, and the candidate was required to in some way make corrections or note errors in the report, whether it be grammatical or spelling or punctuation or what have you.

The problem that we had run into with that type of material is that you are trying to test for a skill which is certainly important on the job and related to the things that a sergeant does, but when the report or this type of material was framed in the context of correction, we would get appeals from candidates, saying: "Well, at our facility we don't do things in this way. Therefore the report is no good and the question is no good."

In other words, they were then answering questions and commenting about questions based on their own personal experiences rather than answering the question that we were asking, which was: "Do you know what's wrong with this report in some way?"

For that reason, at least in part, we have tried to get away from using contextual material for the measure of certain skills such as report preparation. We feel it's a truer measure of the candidate's skill in this area and isn't as confused by possible differences among

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facilities or procedures or so on.

Q Now I call your attention to Plaintiffs' Exhibit 8, the last two pages.

MRS. GORDON: These are the K, S and A statements, your Honor.

Q The first one, the report preparation sub test -- that's the fourth page in Plaintiffs' Exhibit 8 -- states, under the heading "Appropriate for," :Entrance level investigative position."

Now, the next one, which has the sub test title "Supervision," states,under the heading "Appropriate for," "Approximately grades 10 through 14."

Now I show you those, Mr. Siegal, and ask you, could you explain the designation on those forms in terms of the sergeant's examination?

Now, I believe the class specification established that the sergeant's grade is 17 as opposed to 14 and obviously we are not testing for an entry level position.

A Well, there is really no conflict in here. The indications on here are used primarily by the sections preparing the material to give themselves an idea as to the level of the material and the types of things that are involved.

For instance, the supervision sub test, the grades

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that are indicated, 10 through 14, are salary grades. The correction field, especially in the past few years, has received salary grade increases or reallocations based on the scope and nature of the job that they do, which isn't necessarily related to their level of supervision, it might be related to other things such as the problems that exist in facilities, an increased amount of counseling and rehabilitation done by officers, sergeants or something like that.

The indication here is that in general, let's say, positions in grades, say, 10 through 14 are dealing with the same type of test, require the same types of knowledges, skills and abilities.

THE COURT: I am confused with regard to supervision. Grades 10 through 14 don't have supervisors' responsibilities, do they?

THE WITNESS: Are you talking about in the correction field?

THE COURT: Yes.

THE WITNESS: These questions and this indication does not specifically apply to correction or, let's say, it does not only apply to correction. It gives an indication as to the level of sub test within the state service, and this is the type of material that might be

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used on other types of examinations.

THE COURT: Are you saying there are other positions in the state service that do have supervisory responsibilities and fall within grades 10 through 14?

THE WITNESS: Yes, definitely.

THE COURT: All right.

Q While you have those exhibits there, Mr. Siegal, I direct your attention to, for example, the first page at the bottom. There appears to be a code number XD-313.1 (4/5/68)

Does that date have anything to do with the time the sub test is prepared?

A No, it does not. It indicates the last updating of this particular form number, which is XD-313.1.

Q Why are there 15 items on a sub test?

A Well, our department, our staff experts, had decided for certain practical reasons that we would try to use the sub test concept both in terms of item preparation and in terms of analyzing the items. By using a set number of items in each sub test, we are able to more routinely do certain types of analyses on this material that gives us additional information of how the items are working, and things like that. That is certainly one reason.

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In addition, we look at a group of 15 as being a reasonable sample to measure in that group of K, S and A's we are trying to measure on a sub test.

Q What type of source material did you use on the examination?

THE COURT: Wouldn't it vary from sub test to sub test?

THE WITNESS: Certainly, With the laws, rules and regulations, certainly it is obvious the kind of material we would use. Whatever laws, rules and regulations were in effect at the time that we were preparing items or at the time the examination was given, which was actually the key. In terms of the situations, we used primarily input from the three lieutenants from the Correction Department in terms of framing situations.

THE COURT: Is this judgment?

THE WITNESS: Yes. If there was any situation that was posed in a question which related in some way to laws, rules or regulations, or what have you, we certainly checked the pertinent regulations to make sure that the keyed response was in conformity with those existing rules.

As far as the method sub test was concerned, we used a variety of documents, including such things as the

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Manual of Correctional Standards, the American Journal of Correction, various reports in the field, standard texts, and things along these lines.

Now, a point to make with this type of material is this: there is no, say, specific bibliography that we publish that would give an indication to candidates of the exact source of a question. However, any question that was asked that relied on, let's say, a given source, the source in general was readily available to anyone who was interested in the field, it was not a secret document or anything else, and, in addition, the questions that were asked, the information, although it may have been taken originally from a particular document or book or something like that, could have been obtained through some other means, whether it be reading of other books in the field, taking training courses or talking to someone else, or something like that. It wasn't the idea that a candidate--

THE COURT: It wasn't esoteric, is that right?

THE WITNESS: Yes. The idea was a person didn't have to read the exact same book we read in order to answer the question.

Q Mr. Siegal, you mentioned that the Manual of Correctional Standards was one of the source materials, and you mentioned at the outset of your testimony that you

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had familiarized yourself with the field in terms of the correction officer series on or before June 1st or thereabouts.

Was the Manual of Correctional Standards one of the sources you used to familiarize yourself with the field?

A Yes, it was. I used it in preparation -- in the development stage for the captain's exam earlier in '72, plus in terms of reading it for the other correction exams that I was preparing prior to the request for the sergeant's test.

Q Did you read the entire thing?

A Well, there are certain sections there that emphasize things about fiscal planning and budgeting, which really didn't come into play too much in terms of the exams that I was working on at the time. I did glance through them but I wouldn't say that I studied them.

Q With reference to the consultants, approximately how many questions or suggested questions did they actually give you during the course of this process?

A Well, in terms of actually physically handing us objects which we will call questions, somewhere in the neighborhood of 50 to 60, let's say. In addition, during our discussions with them we would discuss other possible

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types of questions and they might not have written them up at that particular time, we may have written them up based on their suggestions. In terms of hard copy, something in the neighborhood of 50 to 60.

Q Now again, I think we have noted that there were at least or there were two items that were multiple keyed, so-called.

Would you tell us what multiple keyed is and why that is done?

A Multiple keys means more than one answer is considered as correct and a person who picks any one of those answers will receive one point for that question.

The reason why it happens, in this particular case, is that we made a mistake. The two items that we had written are, the first one which is in the law sub test and I believe it is question 10 or 13, I am not sure --

MRS. GORDON: This is shown on Plaintiffs' Exhibit 20, your Honor.

THE COURT: 13 shows A, C, D; and 10, I guess, shows C and D.

THE WITNESS: That is correct. Question 13 had an item defect in it in which, in this case, the stem of the question, the first part of the question before the choices, was missing a piece which would indicate where this

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individual in question had originally come from, whether he had come from a court or from, say, a Mental Hygiene facility or from a correctional facility. As a result of that, the question could be interpreted to mean that the person could have come from any one of these places, and as a result he could have gone back to any one of the places described in A, C and D.

For the question in the second booklet, this was a situational judgment item. It became clear to us during the appeals process, based on the things that had been sent in by candidates, that there were two sort of operating philosophies with regard to this situation, and neither one of the, say, tactics that could have been used at this point seemed to have a decided preference over the other.

We did a further check with this item and some of the others with a deputy commissioner in the Department of Correctional Services -- I don't recall exactly who it was at this point--who agreed that either one of the choices should be selected or should be counted.

THE COURT: I am going to have to interrupt the proceedings at this point. I am sorry.

(Recess.)

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K E N N E T H S I E G A L, resumed.

DIRECT EXAMINATION (CONTINUED)

BY MRS. GORDON:

Q It appears that the supervision sub test constitutes 20 per cent of the material on the examination. Was your decision in that regard based on your observation that a sergeant is supervisor 20 per cent of his time?

A I think that would be an inaccurate statement. First of all, if you are talking about the supervision sub test, let's say making it 20 per cent, it obviously has to be in relationship to the other sub tests which also make up, in effect, 20 per cent of the questions on the examination.

In determining weights, which is the question I guess that you are asking, for material, all the things that we have done, the job analysis, speaking with people in the field, and so on, play an important part and help us to determine this. It's a judgment. There is no question about that.

And it has to be a judgment. The only time that you can assign some sort of empirical weights to sections of an examination or something like that is when there is a relationship, an established relationship, empirical relationship, between pieces of, say, a selection

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process or an examination and some criterion, some validated job performance criterion. In the absence of such a criterion, the only thing that can be done is to use judgment and consensus of those people in the field so as to try and, in this case, hopefully succeed to accurately describe the job in terms of those important knowledges, skills and abilities that we want to test.

Q Now, if we look backwards for just a moment, it appears in the '70 sergeant exam, I believe, the laws, rules and regulations was twice as big as it was in '72.

THE COURT: Is it proportionately or absolutely?

MRS. GORDON: Thirty questions.

THE WITNESS: Thirty questions as opposed to fifteen questions.

THE COURT: How about the other sub tests?

THE WITNESS: Fifteen questions.

Q Did you make any judgment with respect to modifying or changing the laws and rules section from thirty to fifteen questions?

A Again, there was a judgment, primarily my own, but certainly with discussions and consensus of the people that we were working with. There is a problem with asking questions about law which to a certain extent require a certain amount of, let's say, quick recall, certain sections.

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We have noted in the past that people who work in correctional facilities have have assignments, let's say, on the wall or something like that, in a tower, have a large amount of opportunity to spend time reading and studying the law, but they never spend any time working with the inmates, they never spend any time doing any rehabilitation and counseling.

THE COURT: The people in those particular positions?

THE WITNESS: Right. To in some way give advantage to these people who normally would have more time to study these things and know these things but never know how to apply them, never had to apply them, for the most part, would, in my judgment, be the wrong thing to do. We are concerned with selecting people who know what to do on the job in relationship to both the subordinates and the inmates, and that is our concern, and to give credit to those people, for whatever reason, who decide to work in a tower away from the population is not the thing that we want to do.

Q I think, finally, we come down to the date the examination was administered. Could you just tell me how long did a candidate who was just taking the sergeant's examination have to take it in terms of time?

A He would have a maximum of five hours.

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Q Is there a candidate appeal --

THE COURT: The way you put it it sounded as if certain candidates might have more than others.

THE WITNESS: In this case, no. What we did is decide the possible number of examinations that a person might take and set a single overall time limit for any combination of examinations. So a person just taking the sergeant would have the same amount of time as a person taking, say, the lieutenant's test or a combination of examinations.

THE COURT: For 34944 every candidate had five hours?

THE WITNESS: That is correct. He could have obviously taken less time. He was able to leave.

Q Is there a candidate appeals process following the examination?

MR. BALLER: Your Honor, I must interpose an objection. It is irrelevant. There is no challenge to the way the examination was given or the way the appeals were handled or the way the scores were computed. I think that is not an issue in this case.

THE COURT: What do you consider to be the relevance?

MRS. GORDON: Your Honor, I just wanted to ask --

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THE COURT: You just wanted to be sure that was true, what Mr. Baller said?

MRS. GORDON: I am glad that is Mr. Baller's position, but the appeals process has some relevance. I am not going to obviously take Mr. Siegal through what all the appeals were. I want to know from Mr. Siegal if he thinks it has any relevance to the validity of the test, and, if so, what relevance it has.

Q How about answering it? Mr. Siegal, do you believe that candidates' appeals process has any role in establishing the validity of the examination and, if so, what role?

A Well, it certainly does play a part. First of all, it is the opportunity for every person who took the examination to object either to individual items in terms of the tentative keys that we have indicated, in terms of either the relevance of the items, the relevance of the sub tests or sections of the test, and on previous examinations we have had people object to both items in terms of job relatedness, in terms of sub test, and so on, and as a result of our view of the candidate appeals, we have in some cases, for instance, removed either individual items or sub tests from the examination.

It's another way of getting some further input on the types of questions that you are asking, insuring

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in some way your relating your questions to the job.

THE COURT: Are you saying that -- let me put it this way.

May I have your attention, Mr. Baller, so you can hear my question?

MR. BALLER: I am sorry.

THE COURT: The mere existence of a process like that doesn't validate the exam, of course. Are you saying that the existence of the appeals process here, together with a limited number of objections, creates a situation in which it can be implied that the candidates believe that the exam was valid?

THE WITNESS: Well, let me say that certainly in the context of this litigation people appeared to be saying that some of the questions were not related to the examination.

THE COURT: Yes.

THE WITNESS: At the time that the examination was given and the following week and based on the appeals we got in, people other than those who have been present here had an opportunity to object on any number of grounds.

We received no objections of that sort. There was one objection relating to relevance on one particular item in the test.

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THE COURT: It seems to me that is what I was saying, that you are arguing where somebody has a chance to object to a test and they don't object to it, that is some proof it is satisfactory and is job related.

THE WITNESS: I think it would have to be taken as some input on that question. I wouldn't say the mere fact that I didn't get any objections on that insured or guaranteed what we had done. I think the other things we have done certainly play a major role.

THE COURT: I wanted to understand what you thought the connection was and now I understand.

BY MRS. GORDON:

Q Are there any types of statistics generated for use in the candidate appeal process?

A Well, we normally and routinely get an item analysis for the individual sub tests and items that are used in the examination and these were viewed in certain statistics. Both item statistics and sub test statistics are routinely calculated and are used in going over the questions themselves, see how they operate, and, in addition to the objections we actually received from candidates, we then go through this appeals procedure whereby we verify and substantiate all the key answers that will finally be used in scoring candidates.

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THE COURT: I don't understand what you mean verifying and substantiating the answers.

THE WITNESS: In other words, the item analysis gives us an indication --

THE COURT: Is this before or after the examination?

THE WITNESS: This is after the examination. It is an indication of the actual answers that people have given to questions.

Now, certainly we had a certain choice in mind when we wrote the question as that one being correct. Now, if in a given situation of a particular item we find, for instance, that the majority of candidates are choosing a different answer or even a substantial number of people are choosing a different answer, we will certainly go back and take another look at that question and make sure that the key is not ambiguous, for instance, make sure that the section --

THE COURT: If you believe it is ambiguous, then do you take the kind of action you took on those two multiple keys?

THE WITNESS: That is correct. The item can be deleted or additional answers can be accepted or just a single different answer can be accepted.

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Q Are there any other things you do which give you an indication of the reliability of the examination?

A Well, some of these statistics that we calculate, the item analysis itself is what is called the high-low -- it gives us a high-low split which is an indication -- well, without getting too deeply involved, it takes a look at how people score on a given sub test. It then divides that group into two pieces, the group that scored best on the items and that group that scored poorest on the items. It then displays their responses to questions indicating the numbers of people in the high group that chose the correct answer and the number of people in the low group who chose the correct answer as well as every other answer.

Now, you would expect in general that an item that is working well, that is working well in relationship to the sub test, for instance, will have more of the high people on the correct answer as opposed to the low people and the greater the difference between the number of highs on the key answer as opposed to the lows is an indication as to how that item is helping to spread out the candidates for that sub test.

There is a statistic called an item reliability index which is calculated based on those numbers, which is

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a numerical indicator rather than just an eyeball indicator.

Q Are ethnic item analysis statistics routine in the correction officer series?

A Well, they have been as long as I have been preparing the examination, which is to include the '72 and '73 correction officer exam and this correction promotion series held in October. I did hold the correction captain examination in the early part of '72, but we did not place that examination on the ethnic retrieval system.

THE COURT: Was this one?

THE WITNESS: This one was, yes.

THE COURT: In other words, if I understand what ethnic item analysis is, you not only found out what the various answers were to the various questions but you analyzed those in accordance with the rates of the candidates as well, is that right?

THE WITNESS: Yes. It gives us -- we get computer printouts which give an indication --

THE COURT: We have looked over some of those, haven't we? No, we have looked over a sheet you made up, it seems to me, from those.

THE WITNESS: These are individual candidate responses to individual items.

MRS. GORDON: At this time I move the admission

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of Defendants' Exhibit H, which was previously provided to plaintiffs, which unfortunately at least the face page, which is the key, so to speak, is poorly xeroxed. We will get you another page.

THE COURT: Have you a good copy for the exhibit itself?

MRS. GORDON: I will look.

Is there any objection to Defendants' Exhibit H?

MR. BALLER: No objection.

THE COURT: It is received in evidence.

(Defendants' Exhibit H was received in evidence.)

THE COURT: Just to be sure we know what this is, this says at the top -- it is a quite long document stapled together -- it says Ethnic IA.

I take it this material consists of the ethnic analysis material you described.

THE WITNESS: That is correct. It is IA, which stands for item analysis.

Q I just want to be clear on one point, Mr. Siegal. In terms of the Department of Civil Service, where would it ordinarily get its material for an ethnic IA?

A Well, it is certainly based on the candidates who take an examination. For the promotion series in this

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particular case, for the sergeant examination, questionairres were mailed out to all candidates who had applied for the examination. It's a voluntary questionairre and they were certainly under no obligation to return them. Those people who did return them and who indicated the ethnic group they felt they belonged to were coded initially and used in preparing an item analysis. I don't believe that this is --

THE COURT: What did the questionaire ask besides "What race do you belong to, if you are willing to tell us"?

THE WITNESS: The questionaire has been undergoing certain types of revision. It now also includes the question as to the sex of the candidate, although in this promotion series, since they were all male titles, it didn't affect it.

There have been questions relating to -- well, certainly the social security number is asked so we can use it for research purposes in terms of identifying candidates' answers.

They have also asked questions about where you first heard about the examination, they ask the title of the exam that you are planning to take, and things like that.

THE COURT: This is a questionaire sent out before

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the exam is taken, is that correct?

THE WITNESS: It is sent out prior to it in general, as it was in this case. We have been using procedures for the correction officer examination, which is an entrance level, and we do some other things, such as we pass out the questionaires at the actual test center itself and we have the people fill them out there and collect them.

In general what this means is that we normally get a larger return on the samples. A lot of people don't send things back in. In general, on an entrance level, you would find --

THE COURT: You have answered my question.

BY MRS. GORDON:

Q Is this ethnic IA, Defendants' Exhibit H, based on that type of sample return of questionaires?

A I don't believe that this particular one is. I would have to check on the date.

THE COURT: Look at this. It is a little easier to read.

A (Continued) No, this is not based on the sample that was gotten strictly from the ethnic retrieval system.

Q Was this document prepared in the course of this litigation?

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A Yes, it was.

Q What action did Civil Service take to obtain the ethnic data contained in this ethnic IA as opposed to the voluntary situation you mentioned?

A Well, in the course of the litigation, my supervisor, Sam Taylor, I believe requested from the Department of Correctional Services that they provide us with a list by identification number of all those employees in the department, custodial employees, who were either black or Hispanic, and that was the data that was used in preparing this particular item analysis.

Q Can the same types of statistical data you mentioned before, item reliability, indexes and so forth, be computed on this type of IA, in other words, the ethnic IA as contrasted with the let's call it the regular item analysis you mentioned during the candidate appeals process?

A The only difference between this item analysis and an item analysis, the regular one, for the whole exam is the fact that this one separates people out by their ethnic group. Other than that, it is the same general format. Certainly the same types of statistics can be calculated.

Q In terms of the types of statistical methods that would be used in a reliability situation, do you believe

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a split half method would be appropriate to this type of situation?

THE COURT: You are way ahead of me. I don't know what those terms mean. Explain them before you ask questions. Ask Mr. Siegal to explain the terms.

Q Are you aware of a statistical method known as a split half?

A Well, let me say first that when we talk about reliability, which is the question here in relation to split halfs, there are two basic types. One is a question of reliability of the measure, let's say, over a period of time, giving a test and then retesting, making sure a person would get similar scores on repeated test taking.

The split half, in some tests the test-retest is not possible. For instance, in the situation we have here you can't give the people a test and then say, Come back next week and we will give you the test again and we will see how you do at that time and we will average the scores out," something like that. They certainly can go out and study the test, study parts of the test, in between. We can't use that kind of situation.

To attempt to get at this idea of test-retest reliability, there are methods used, statistical methods used, whereby you view the examination itself in terms of

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being a test-retest situation. So you look at sort of portions of the test in relationship to other portions of the test. You might use a split half which says, "I am going to split the test in half, setting up, in effect, two parallel forms." I am going to match questions in terms of what they are measuring and how difficult the items are and how they spread out candidates, and things like that. I am going to match them up and see what the relationship is between people's scores on the first half of that test and the second half."

Another means of doing this would be the odd-even type of split, where you say, "Well, let's take a look at the test. We will say that one-half of the test is 1-3-5-7-9 and the other is 2-4-6-8-10."

It is an attempt to do test-retest under a single administration of the examination.

The other type of reliability is the question of are the questions themselves as a unit in some way internally consistent, do they all measure exactly the same thing. If a person gets the first question right, will that in some way mean he is more likely to get the second question right and the third question right, and so on?

Now, the question of internal consistency applies generally to groups of homogenous items, things that are

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obviously testing the same thing. A certain general ability test, you would expect if you would have an arithmetic test, let's say, where you are measuring the skill, let's say, of arithmetic, you would expect that if a person is able to add two and two he is able to add four and four, and if those are two items in a test, you would expect a person who gets the first one right would also get the second one right, and so on.

In the type of test like the sergeant examination, however, we do not, for most of our sub tests, consider them to be homogenous. We are sampling from a universe, we are selecting items that measure several different K, S and A's and there are certainly no guarantees that a person who is able to train an individual on the job would necessarily be good at evaluating a person on a job. As a result, we would expect the statistics relating to internal consistency for our sub tests to in general be relatively low. As a matter of fact, if they are relatively low we are then getting an indication that what we are doing is working well. If all the items that we had originally set up as supposedly measuring several different things all related highly with one another, then obviously we would be doing something wrong.

Q Are employees' attitudes and motivations relevant

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to job performance, in your opinion?

A It is definitely my own opinion that certain attitudes or behavioral characteristics or personality traits, or something like that, could be related to job performance.

Q Does 34944 test employee attitude?

A It is certainly not a personality test. There are certain, let's say, situational questions which in some way candidates' answers will respond based on certain attitudes that they may have, but we do not purport that this examination is an attitude or a personality measure.

Q In your opinion, does a personality test have to be validated to be used?

A Well, it certainly seems to me fairly clear that a personality test cannot be shown to be directly job related. Therefore --

THE COURT: I am a little unclear as to why we are going into this area. I thought Mr. Siegal says he doesn't consider 34944 to be testing attitudes of personality except to the extent it may do so almost by chance.

MRS. GORDON: Your Honor, it is my understanding that plaintiffs will attempt to show this test is invalid in some way or other by reason of the fact it does not

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test personality or attitude. If plaintiffs don't intend to do that I won't ask the questions or, in the alternative, the testimony could be stricken afterwards. I would like to be able to do it in one block.

THE COURT: Right.

Q I am sorry. Does a personality test in your opinion have to be validated?

A Well, I don't see how a personality test can be shown -- in the format it would have to be set up, which is in some way a sort of disguised format --

THE COURT: I am going to have to ask another question. In this context, what is meant by a personality test?

THE WITNESS: Well, I would say that a personality test is some measure of a person's -- a variety of characteristics that may be labeled traits or attitudes or something like that.

Now, there are some measures that may relate to only a single trait, an empathy scale or any number of different things, for instance, and some that purport to measure a variety of different aspects of an individual's personality and characteristics. Any test that would be written would have to be shown that it really is measuring something and the test constructor would try to indicate

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what it was he was trying to measure.

THE COURT: I take it or I understand that the test for personality would test a person's traits. I take it that in this context, maybe the plaintiffs are the ones to answer this question, if a personality test were to be required, it would be the kind of personality test which attempted to test a person's traits in relation to the job in question, is that correct?

MR. BALLER: I am unable to respond, your Honor, because I am not sure what Mrs. Gordon means by our contention.

THE COURT: If you don't have a contention, while this is very interesting I would rather go on.

MR. BALLER: We do believe there are qualities and important skills and abilities having to do with the way corrections sergeants react in correction situations, and particularly in the personal, human situation. I don't understand exactly what is meant by a personality test. I really don't know if I can characterize what our contention is in terms of whether or not we think there should be a personality or attitude test. I am a bit lost on the whole discussion.

MRS. GORDON: Perhaps we could clarify it between plaintiffs and myself.

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If plaintiffs' contention is that it's important to get at job related attitudes and that this cannot be done in the context of a written competitive civil service examination, then I believe my questions to Mr. Siegal are pertinent. If plaintiffs' position is that there should be more questions on situational judgment, for example, on an examination like 34944, then obviously my questions to Mr. Siegal would be irrelevant.

In other words, if plaintiffs are talking about traits that have to be measured by a different type of devise, then I would like to proceed with Mr. Siegal's questioning.

MR. BALIER: Again I am not quite certain I understand the problem posed, but let me try to respond to it.

Our contention is that there are some knowledges, skills and abilities having to do with inter-personal behavior which are not attempted to be measured by this examination which might be relevant, which might be possible to measure by an examination, which might be possible to measure by some non-written examination selection technique.

THE COURT: Could those knowledges, skills and abilities be roughly classified as abilities to handle people or deal with people or related to people? Is that

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the kind of thing you are talking about?

MR. BALLER: May I confer with my associate?

THE COURT: Yes. I think plaintiffs have to take some kind of position on this point or else the rest of us can't look into what you want us to look into.

MR. BALLER: I think that would be one of the things that we contend that is involved in the job and for which no attempt is made to get at in this selection procedure.

THE COURT: We have to understand what your contention is on this branch of the subject. Can you refer me to anything in your papers, pleadings, which specifies what you are objecting to?

MR. BALLER: Our contention would be there is some way to measure this type of qualities we are talking about and the failure to attempt to measure them is one of the deficiencies of the selection process.

THE COURT: The type of qualities we are talking about is important, to me anyway. A man's personality can encompass an awful lot of things besides his ability to get along with people. Here we are talking in terms of supervision and so forth, the ability to get along with people, regulate, or whatever, that suggests itself to me. That is a much narrower subject than total personality.

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MRS. GORDON: Your Honor, I think maybe we could clarify it.

My problem is this: I don't understand whether plaintiffs mean that we failed to measure certain knowledges or skills which are amenable through a competitive testing framework or whether their position is that we failed to use another type of device such as I think Mr. Siegal mentioned, an empathy test or a Rorschach test or some other device which would obviously be in a different kind of framework than a competitive test. If they are talking about things we could measure on competitive tests, then I have no argument.

THE COURT: Would it be a more effective way of dealing with this subject for this area to be postponed for rebuttal, if necessary, after you have heard plaintiffs' expert.

MR. BALLER: I don't think so. I understand Mr. Gordon's concern in light of the last statement.

THE COURT: All right.

MR. BALLER: With the exception I don't understand us to be pushing for a Rorschach test or empathy scale or anything like that, we do pose the contention that these are characteristics which might be measured by a written instrument and failure of this instrument to

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attempt to measure them was a deficiency of the exam.

THE COURT: Are we restricting this primarily to the question of supervision? For example, it has nothing to do with laws and reports, it has nothing -- it may have to do with good judgment, I don't know, but there are certain parts of the test it clearly relates to and other parts it clearly does not relate to.

MR. BALLER: And there are other things on the test it does not relate to.

MRS. GORDON: Is plaintiff talking about interest in the job, diligence, human understanding? Are those the kind of things that the knowledges, skills and abilities that you contend are relevant to, and, if so, is it their position that these can be gotten at in a competitive testing framework?

Are they talking about another type of device?

THE COURT: I note the difficulty that any lawyer would have in trying to answer these questions and I noted that in that I see Mr. Baller is understandably consulting with his consultant, and it seems to me, therefore, it might be easier, and that is why I made the suggestion, let's hear your expert on what he thinks the deficiency is, and if Mr. Siegal disagrees he can be called back. I don't think we should proceed in the dark.

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MRS. GORDON: It is not quite in the dark. I did take a deposition of Dr. Barrett.

THE COURT: Then why don't you question Mr. Siegal in relation to the subject matter you understand Dr. Barrett will speak on?

BY MRS. GORDON:

Q I may be using the wrong word in terms of personality test. Is there a label, Mr. Siegal, for these devices --

THE COURT: Can I ask, Mr. Siegal, have you read Dr. Barrett's deposition?

THE WITNESS: I have seen the majority of it, yes.

THE COURT: Have you seen that portion of it which deals with the subject we have been discussing?

THE WITNESS: I have seen I believe several sections in there that relate in some way to either the use of or applicability of it.

THE COURT: Perhaps it would be easier to let Mr. Siegal give a narrative answer on this, to say what he understands Mr. Barrett's views or Dr. Barrett's views to be and to give his own.

MRS. GORDON: Mr. Siegal was also asked on his deposition his own views and that is, frankly, what I am going to, his own views. I think if we need more, your

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Honor, I would be glad to come back on rebuttal.

THE COURT: I don't want to lengthen it.

MRS. GORDON: No.

THE COURT: I have two objectives in mind only: one, to be able to understand this myself, whether other people understand it or not, and, second, to keep the record as short as possible.

MR. BALLER: Since we did ask Mr. Siegal these questions on deposition, I guess our position is they are relevant.

MRS. GORDON: Thank you, Mr. Baller.

Q Just to clarify, Mr. Siegal, is there any kind of label in the profession given to tests that go to finding attitudes of employees in relation to their job performance?

A There are things which might be called tests. In general, they are called something like inventories or scales or something along those lines.

Q Now, what I want to ask you is, do these inventories or scales have to be validated in order to be used, in your opinion?

A Well, certainly according to APA standards any instrument is supposed to be validated in some way prior to its use. Certainly scales of this type would have to be.

Q What types of validation models or methods in

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your opinion do they have to be validated under?

A Again, a test or a scale or anything is validated on the basis of its proposed use and in the context of this litigation if a scale of this kind were to be used in some way in the selection process for, say, correction sergeant, all right, it becomes clear that a content validation process would be totally insufficient because of the fact that there is no way that you can demonstrate in any reasonable fashion that a, you know, interest inventory or personality scale is directly job related.

The questions have to be structured in such a way automatically so that the person responding to this questionaire is not clear as to what he is answering to. Otherwise he can certainly answer it in such a way that it appears he is honest, brave and true when in fact he is not.

It then becomes questionable as to whether either construct validation or criterion related validation or both pieces of the process or whatever are things that are most appropriate. In either case, the existence of some job performance criterion, a validated job criterion, would be necessary to perform an empirical study as to the relationship of this personality scale or what have you to the actual performance on the job. I don't think there

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is any way that you can use a personality scale purely under the basis of the content validity framework.

Q Have you yet developed, either as a result of the criterion validity study under way or in any other way, a criteria or set of criteria which could be used in validating these types of inventories or personality tests in the correction series context?

A We have at the present time no validated criterion measure. We have been working on things, certainly we have been tied up by this litigation in terms of working on it, but as early as April of '72, myself along with several other people were working on both attitude questions of one sort or another and, in addition, on some type of performance rating scale. Both of these were written at that time primarily in relationship to the correction officer series but certainly to some extent would apply to possible future use for the sergeant and related titles.

THE COURT: Can you give me an example, two or three examples, of what kind of questions might be asked in such a scale or whatever you want to call it? It seems to me it is another name for a test.

THE WITNESS: All right. For instance, we have noted, in doing some analysis of the performance rating

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scale, that we had that when a person is rating other people such as subordinates he gives an indication as to the framework in which he is working. So, for instance, if we were to pose questions of an officer, let's say, in terms of having him describe the characteristics of inmates, as a for instance, we might find that he is also giving an indication of himself and his own behaviors and attitudes.

There are certainly more direct ways such as asking him questions about himself. There are several different approaches to it. Those are a couple of ways that we might use.

Q These devices, these inventories that get at attitudes, do they in your opinion or within your knowledge result in competitive ranking at this direction?

A The primary use, if such scales would have to be used at all, would have to be in some sort of general selection, initial selection, process. I don't think that you could say a person who has a ten on the empathy scale will make a better sergeant than a person who has nine and a half on the empathy scale. I don't think that the measures are purported to be that reliable.

Q Is it essentially a screening device as opposed to a ranking device?

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A It most likely would have to be used along those lines if it were used at all.

Q Assuming you had this type of device available to you now in a validated frame, would you substitute it for 349447

A No, under no circumstances. Well, let's say that we would not do it.

THE COURT: Do I understand that plaintiffs say that such material should be substituted or simply added?

MRS. GREENBERG: We are not saying it should be substituted, your Honor; that it should be part of the total selection procedure.

THE COURT: Let's ask that question.

If you had such a test validation device at the present time, would you make it part of your validation?

THE WITNESS: If such a device existed that had been empirically shown to relate to the position of correction sergeant, I certainly would use it.

MRS. GORDON: I would like to note I think the legal area of this case is a little peculiar in this context -- with specific reference to this context. While I am not an authority on the cases in this field, I am not aware of any legal proceeding that said that an examination was not job related because a personality inventory

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or additional types of those devices were not present. My understanding of the area of the litigation is that it is supposed to be focused on the actual examination that was given in the context of the job rather than adding elements to the process.

Q Mr. Siegal, I show you Defendants' Exhibit R, which are duty statements,or the actual name is individual post descriptions and plot plans, where they were available for the title of sergeant in the several correctional facilities of the State of New York.

MRS. GORDON: I would like this marked for identification, your Honor, as Defendants' Exhibit S.

(Defendants' Exhibit S was marked for identification.)

Q I show you Defendants' Exhibit S marked for identification, a document entitled correction sergeant tests compiled from facility post plot description, consisting of two pages, and a third page -- this is all stapled together as one document -- entitled correction sergeant examination 10/14/72, sub test used, and then the document follows, and a final page entitled correction sergeant, with two charts, the first chart being a comparison of job tasks to test tasks, the second chart -- moving from the top of the page down -- being a comparison of job K, S and A's.

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Now, Mr. Siegal, did you have occasion to supervise the drawing up of Defendants' Exhibit S for identification?

A Yes. This was compiled by, in part, myself and the people who work for me.

Q When did you do that?

A This was done -- well, I don't remember the exact date. Certainly after the examination and after the beginning of this litigation.

Q Let me ask you this: Did Defendants' Exhibit R, the post plot plans and the post descriptions, were they used by you directly in the construction of examination 34944?

A No, they were not. They were not either seen nor used by me personally or by people from Civil Service.

Q I note, by the way, in Plaintiffs' Exhibit 5, I believe it is -- that is actually 10. I am sorry -- which is an excerpt from your project diary, there is an entry on the third page of Plaintiffs' Exhibit 10 entitled 10/11/72:

"Hy Sperbeck brought over post descriptions for Greenhaven, Wallkill, Matteawan and some at youth camp to aid our job analysis."

Are these the types of materials that Hy

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Sperbeck brought over?

THE COURT: Referring to what? What have you got in your hand?

MRS. GORDON: The individual post descriptions, Defendants' Exhibit R.

Q Are these the type of materials Hy Sperbeck brought over?

A Those are just for sergeants and covered the entire range of custodial positions at each one of these facilities.

Q I want to establish, did you study the materials Hy Sperbeck brought over on 10/11/72 for the purpose of 34944?

MR. BALLER: May I ask, Mrs. Gordon, I am not clear, the materials that are referred to, they are part of Defendants' Exhibit R?

THE COURT: They are similar, apparently?

MRS. GORDON: They are similar material. In fact, there is a Greenhaven sergeant post description in these materials.

MR. BALLER: Were some or all of the documents in Defendants' Exhibit R brought over by Hy Sperbeck? Would you please ask the defendant to identify what he is talking about?

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MRS. GORDON: I am trying to establish this was a post hoc operation, your Honor, and not that the materials -- I am simply trying to cover the point of the entry in the memorandum so there won't be any question that Mr. Siegal did not use Hy Sperbeck's materials on that date in support of 34944, your Honor. I am simply trying to establish that.

THE COURT: I am lost. I don't know how he has said or not said it or what difference it makes. If what you are trying to find out is the extent to which either Exhibit R or the materials brought by Hy Sperbeck on October 11 were used in preparing 34944 -- is that it?

MRS. GORDON: Why don't I ask it that way?

Q To what extent were materials used -- materials or materials of this type, namely, individual post descriptions -- used in preparing 34944 by you?

A They were not used by me. Do you want me to answer Mr. Baller's question?

THE COURT: First let me ask you this: You know the area that people are trying to investigate here. When you say they weren't used by you, are you suggesting they might have been used by somebody else? Tell us what you know about it.

THE WITNESS: The point I would make is that I

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did not know of the existence of these things prior to the examination except, say, a week or two before. When I learned that such things existed, I immediately asked one of the people who was working with us, Hy Sperbeck from Corrections, who had mentioned it originally, to get us some representative samples. It was obviously too late to use them directly in the preparation of the sergeant examination. He therefore brought us over the complete plot plans and post descriptions for a representative sample of the correction facilities, namely, the hospital, a youth camp and so on.

THE COURT: To what extent did they finally find themselves into the exam, or didn't they?

THE WITNESS: They were not used by us. Again, I had not seen them.

THE COURT: Why do you say "by us"? Were they used in the exam or weren't they?

THE WITNESS: The point would be that I had no knowledge of them prior to it. Certainly no one in Civil Service who was working on the examination did. I would expect, however, all right, and I am sure, that some lieutenants who were working with us had at least seen pieces of these documents or may have been instrumental in preparing some of them.

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THE COURT: That is an assumption?

THE WITNESS: Right.

MR. BALLER: Note the objection or motion to strike the answer. Mr. Siegal has testified he doesn't know.

THE COURT: Right. I will strike his answer, or that part of it, because it is based on an assumption which may or may not be correct.

So you have no personal knowledge of the use of the post descriptions in constructing the examination, is that what it boils down to?

THE WITNESS: That is correct.

MRS. GORDON: That is exactly it.

BY MRS. GORDON:

Q Now, did you have occasion after the commencement of this litigation to utilize these post descriptions in any way? If so, will you please describe in what way and with what result?

A Well, Defendants' Exhibit S, portions of this, for instance, the job tasks listed on the first page and the K, S and A statements on the second page, were compiled from these descriptions for the sergeant position.

THE COURT: In other words, Defendants' Exhibit S took some of the materials within it for Defendants' Exhibit

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R?

THE WITNESS: Precisely.

THE COURT: And that was after the test?

THE WITNESS: That is correct.

Q What was the purpose of taking the material from Defendants' Exhibit R? Did you make any comparisons with it?

A Well, we made comparisons between the test tasks. On the last page of this document there are several different displays of one sort or another.

THE COURT: You are talking about Defendants' Exhibit S?

THE WITNESS: Yes. There is one between the job task as excerpted from Defendants' Exhibit R with the test tasks that were on the sub test descriptions. The second chart is the job K, S and A's taken from the post description corresponding or showing correspondence with the test K, S and A's that were on the test task description.

Q I want to ask you one thing on K, S and A's. The post descriptions, that is, Defendants' Exhibit R, some or many of them have a section filled in or not filled in saying K, S and A's and attitudes, in other words, the document prepared by Correctional Services.

In your opinion, are the K, S and A's as described

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in the individual post description relevant to your use as a Civil Service examiner?

A Well, there are two questions there. Number one, within the framework of the examinations that we prepare, certain knowledges, skills and abilities might be related to those particular knowledges and skills and abilities that we would try to test for.

Attitudes is again open to question as to whether or not we can use it in a civil service framework.

Q By the way, in making these comparisons, did you use the attitude descriptions that appear in the individual post descriptions?

A As I said before, we do not state in any way that we are trying to measure attitudes except in a very slight way, I would say, on our examination. For us to try to show correspondence we have already said we are not looking for is absurd.

THE COURT: I understand that. I am still in the dark as to what the purpose of all the discussion is. At least I would like to try to understand what the answers to the questions are.

MRS. GORDON: I will make an offer of proof.

The purpose of the discussion is to establish whether or not given this essentially new source of infor-

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mation, the individual post descriptions, Civil Service took any action to see -- in the litigation context, no question about it -- to see whether or not there was a correspondence between the tasks or duties sought to be elicited on the examination itself and this particular set of independent evidence. That is the sole purpose.

THE COURT: That is a very good question. Did you?

THE WITNESS: Yes, we did.

THE COURT: Will you tell us what you did?

THE WITNESS: Well, it involved a two-stage process, one which is examining the documents in Defendants' Exhibit R and preparing the job tasks and things that relate to the given posts at the different facilities, and the second piece is extracting the knowledges, skills and abilities that are listed, for the most part, on the bottom of these sheets.

Now, of course, there may be times when one post at one facility has some skill such as ability to -- I don't know -- be a locksmith or something like that which is fairly obviously not a standard knowledge, skill and ability for the position of most sergeants. That type of thing was for the most part left off this document.

We then just made a listing of the things that

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were already on the sub test description and set up a chart showing if there was correspondence between the two.

MRS. GORDON: By the way, I move Defendants' Exhibit S in evidence at this time.

MR. BALLER: We object to that and would like to state the basis. The basis is that unlike a simple statistical summary of what a broader statistical base shows, this involves a selection, a restating of a number of qualitative changes in the information contained in Defendants' Exhibit R to the information contained on Defendants' Exhibit S.

If your Honor will examine Defendants' Exhibit R, many of the component parts don't have the job task statements that are listed here. Some of them do. Many of them don't have K, S and A statements. Some of them do. The K, S and A's contained on different items within Defendants' Exhibit R vary. In other words, this is not a simple summary of Defendants' Exhibit R. It is also not a business document since it was admittedly prepared for the litigation.

THE COURT: It wasn't offered as a business document.

MR. BALLER: I think it is offered as a substitute for testimony about the relationship between the statements

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in Defendants' Exhibit R and the test, and I think that should come in the form of direct testimony regarding Defendants' Exhibit R and the examination and not this document.

MRS. GORDON: Your Honor, I would like the record to show that when I became aware of the existence of these post descriptions I sent the complete set of post descriptions to the plaintiffs. I believe it was about a week and a half or two weeks ago. It included, of course, the sergeant's position.

We have obviously, in view of the fact we are concerned with sergeants, excerpted the sergeant group rather than giving your Honor the entire box of materials, although that is the box that I sent plaintiffs and that I transmitted to Mr. Siegal.

Now, certainly we don't object to any cross examination with respect to this document. If plaintiff wants to ask Mr. Siegal how the work was done, I am sure Mr. Siegal would be glad to elaborate.

THE COURT: Let me suggest Mr. Baller conduct a brief voir dire with regard to Defendants' Exhibit S at this time so that I can judge whether I think it is properly admissible.

MRS. GORDON: I would note that the documents

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themselves, Defendants' Exhibit R, we have put in evidence.

MR. BALLER: We have no object to any direct use of Defendants' Exhibit R or testimony about it.

THE COURT: I understand. I understand the question is you are saying that Defendants' Exhibit S basically is not a summary of Defendants' Exhibit R. You can go ahead and examine the witness about that.

VOIR DIRE EXAMINATION

BY MR. BALLER:

Q Mr. Siegal, referring to Defendants' Exhibit S and the job tasks listed on the first two pages of that, where in Defendants' Exhibit R did you find the job tasks?

A They are located, I believe, for the most part in the upper section of the documents which describe the things that people do.

Q Is that the part called "Duties" in Defendants' Exhibit R?

A I believe so. Let me look at it, please. Yes.

Q Defendants' Exhibit R is a compilation of a number of different individual post descriptions relating to different institutions and different posts within the various institutions, is that correct?

A It's a description of the sergeant posts at each facility and the stack you have covers the facilities that

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have sergeants.

Q Are all of the job tasks listed on Defendants' Exhibit S found in all of the individual post descriptions?

A No. There are job tasks that obviously are not performed by certain sergeants on certain posts.

Q Is there any indication in Defendants' Exhibit S of how many of the underlying Defendants' Exhibit R post descriptions contain the job tasks listed here?

A That is certainly not a piece of this document and I am not sure that we have generated that type of information as to the frequency of these things on Defendants' Exhibit R.

Q Let me ask you to assume there may be 50 or 100 individual post descriptions here. If a certain job task is listed as a duty on all 50, it would appear as one item here?

A I would certainly expect it would.

Q If it was listed on one out of the 50 individual post descriptions, would it also appear here as a job task?

A No. If it only appeared on one --

Q How about five?

A Five? Can you give me an individual case?

Q You are the one who prepared the exhibit.

A As I said, it was prepared by myself in part and

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my staff. Now, the particular frequency that they used in determining whether or not something would go into this document I am not exactly sure. However, anything that was clearly a task relating to a specific post that did not carry across institutions is certainly not in there. I have not counted frequency of tasks on those documents.

Q Did you give them any instructions as to what differentiated an isolated duty for a specific post from a duty generally found in correction sergeant jobs?

A I don't know that I could come up with a general guideline for something like that. There is no question that there is an element of judgment in making any type of selection and there certainly was an element of judgment in the selection of these job tasks.

However, I believe that this document does accurately describe the majority of tasks that cut across posts and facilities.

Q Is it your testimony, then, that you gave people inyour office who did this actual work no guidelines as to the exercise of their judgment?

A No, I didn't say that.

Q Did you or did you not give them guidelines?

A Yes. I discussed with them the object of this compilation.

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Q And you don't know, though, whether 10 per cent would be a sufficiently frequent appearance of a certain duty to appear on this statement?

MRS. GORDON: Your Honor, I don't think it is established that duties have to be with a mathematical frequency in the first place in order to be considered an appropriate job task.

MR. BALLER: I am trying to find out what this document means. The part we are talking about now is entitled "Correction sergeant job tasks," and I take it that refers to the correction sergeant job generally. I am trying to find out if 10 per cent of the correction sergeant jobs had one of these tasks that would be listed, 1 per cent, 50 per cent.

THE COURT: I understand what you are trying to bring out.

BY MR. BALLER:

Q Let me go on to the knowledges, skills and abilities.

Is it also true that in the various component parts of these individual post descriptions there are knowledge, skill and attitude statements?

A I believe that most of them have those statements on there. There are some facilities, I believe, that have blank spaces.

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Q Do they differ?

A Yes, they do.

Q Some posts have different knowledge contents and some places have different skill contents and some don't have any listed?

A That is correct. I would make the comment that it appears that certain facilities had a certain style in terms of the type of words that they use and some of the descriptions that they use which seem to be facility based rather than being directly related to that particular post. It would appear there may be an individual or small group of individual --

THE COURT: The content might be the same as some other place even though they described it differently?

THE WITNESS: Yes. We are not saying this is a word-for-word extraction from every single one of those.

THE COURT: Let me ask you a question. Either Mrs. Gordon or you can answer it. Perhaps Mrs. Gordon can best answer it.

For what purpose are you offering this document, to establish what?

MRS. GORDON: That there was in fact a correspondence between this examination and the duty statements.

THE COURT: Is that supposed to be shown by

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the chart at the end?

MRS. GORDON: Yes, your Honor. And for the purpose of showing that the exam was in fact job related even without regard to the entire process by which it was generated, if the court chooses to view it that way, or, in the alternative, as an independent means of verifying the results that Mr. Siegal did in fact reach as a result of his own process.

THE COURT: Any further questions?

BY MR. BALLER:

Q Do you know whether there is any individual post description in this package which lists all 15 of the knowledge, skill and ability items that are found on page 2 of Defendants' Exhibit S?

A You said if it actually lists all of those?

Q All 15.

A I am not sure. I would doubt that one of those would list all 15, certainly in that terminology.

Q Do you know if there are some that don't list any of the 15?

A Well, as I mentioned before, there are some that don't list anything.

Q What instructions did you give your staff in

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the compilation of the knowledge, skill and ability listing for the correction sergeant job as taken from Defendants' Exhibit R?

A They were to compile the representative list of those knowledges, skills and abilities that were listed on Defendants' Exhibit R.

Q Did you tell them what constituted a representative list as opposed to an all-encompassing list?

A No, I do not believe that I gave them specific --

THE COURT: I wouldn't expect him to have to do that. I don't think he was dealing with people who were completely incompetent or un-understanding.

Q If a skill statement appeared in only one post description, do you know whether or not it would appear in Defendants' Exhibit S?

A I think, as I have said, I have not gone through that and determined a frequency count. There are some cases where it is obvious, employed in some general way, that a certain knowledge or skill is necessary. If we were able to find a more direct statement of that on one particular form and that wording is not listed on any other form, it certainly does not mean that that is not a required task for the position of sergeant.

Q Do you know whether or not if a certain knowledge

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appeared on 10 per cent of the forms it would be included in this list?

A It most likely would. However, as I said, I do not have any information regarding the frequency of occurrences on those documents in regard to their likelihood of appearance on this document.

Q In reference to the last page --

THE COURT: How did you satisfy yourself that you actually got the sample that you wanted to get?

THE WITNESS: Well, I reviewed both of the documents after this was completed.

THE COURT: Both of which documents?

THE WITNESS: Defendants' Exhibit S and Defendants' Exhibit S.

THE COURT: And you mean you felt, after looking at Defendants' Exhibit S, that it did represent the kind of sample you wanted from Defendants' Exhibit R?

THE WITNESS: That's correct. Again, I did not redo what had already been done by my staff.

THE COURT: Did you change it at all as a result of your review?

THE WITNESS: I made a couple of comments on some of the, I believe, job tasks based on what I have seen in there. Exactly which ones they are, I can't recall.

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Q In regard to this last page, which is the pair of charts, the two coordinates of job tasks and test tasks, the question is, tothe extent that the meaning of the job task listed is irrelevant fo the meaning of the correction sergeant job in few or many or some instances, this chart would be misleading, would it not?

A I don't understand the question.

Q If some of the sergeant's jobs do not have this as a job task, then with reference to those sergeant jobs the chart would be misleading, would it not?

A I don't think that anyone could say that every post or assignment that a sergeant has is going to include or focus primarily on every single knowledge and skill that might be required by any sergeant at any facility. It is certainly clear that some sergeants worked, let's say, primarily with record keeping or something like that, some may be involved in constant supervision of inmates.

There are many different types of areas they may be dealing with. I don't think we have ever said that the elements of the job, of every job, are either listed in the task or that the task or the related test tasks necessarily describes every single position or post.

THE COURT: Can you tell me in the test tasks on the last page here, item L seems to read "Sentences,"

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is that correct?

THE WITNESS: That's what it would appear to read, yes.

THE COURT: What would that mean in relation to a sergeant's job, if you know? I understand all the other subjects, but that is confusing.

THE WITNESS: I am not clear as to whether something is off here or not. I don't know at this point. I have to refer to some other document. This is obviously a shorthand statement.

BY MR. BALLER:

Q Take the job task item of clerical work which I think you indicated was not in this as a job task.

A Excuse me?

Q Clerical work, you said some sergeants were doing clerical work. It is not listed as a job task.

A I think under investigations and reporting it is certainly an element of and involved clericalfunctions.

Q Do you know that?

A Yes, I do.

Q Are the people who sit in the deputy's office working on administrative clerical work who are sergeants -- there are some, are there not?

A There are some sergeants --

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Q Are they considered to be carrying out investigation and reporting?

A I am certain that some of the things that they do relate to investigations and reporting.

Q Were they included in the investigation and reporting job task by your staff; do you know that?

A I cannot specifically answer that question without going back and asking my staff.

Q Would the same type of comment apply to the K, S and A listings, in other words, that the listings contained on this chart may or may not contain some of the knowledges, skills and abilities that are indicated as relevant to individual posts?

A I am not following you. I think I said before that certain of the K, S and A's may not relate -- certainly all of them do not relate to every post. I don't know if that answers your question.

Q So there are some K, S and A's that are not reflected here?

A There are certainly no K, S and A's related to the majority or important to the majority of sergeant posts or duties, what have you, that are not listed there.

Q Rather than majority, how about 20 per cent? Are some K, S and A's relevant to 20 per cent that may not

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have gotten onto this chart?

A That is possible, I suppose.

Q How about 35 per cent?

A Again you are asking me for numbers.

Q You don't know?

A No.

Q Would your staff know?

A I am not sure whether or not they have kept records on frequency counts of number of times that either a K, S and A or task was listed and how many they needed to put in the report.

Q Is it possible with reference to a knowledge or skill --

THE COURT: Let me interrupt. I am reluctant to receive this in evidence without having as a witness some person who would be in a position to answer some of the questions. Mr. Siegal, you cannot. It is not your job. Too much depends on the degree of relatedness, and if there is someone who can give me a clearer picture of that, I would rather have the testimony of that person before I receive the document.

Let's take a short recess.

(Recess.)

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the job K, S and A being that information set forth in Defendants' Exhibit R?

A Well, they were there, obviously, and it's another input, it's another way of looking at what we have done in relationship to some other documents prepared by other people. It would not be used to completely verify the process since they are documents and there is not as much judgmental input on those things. Somebody just listed things. All right. But it was there and we felt it might be significant.

Q In your opinion, what's the significant part of Defendants' Exhibit S for identification, the job K, S and A versus the test K, S and A, or the tasks?

THE COURT: You mean the more significant?

A I would say more likely the tasks themselves are more closely -- a little bit more significant from the point of view that the people who wrote these job K, S and A's may not have had any experience in relating knowledges, skills and abilities to specific tasks. We don't really know exactly who prepared all of the documents in Defendants' Exhibit R.

Q You stated at the outset of your testimony that you had -- you described generally the sources of knowledge or information you had about the correctional series since

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A Yes, certainly.

Q Why didn't you put a clerical sub test on the examination?

A Well, in developing an examination, the question of importance always comes into play. I don't think that we had any indication, let's say, that a person who perhaps can perform certain basic clerical functions may be a little bit faster, may be a little bit neater, or something like than, than another person makes a better sergeant in any way. Certainly the report preparation sub test deals in some way with clerical operations. However, it gets at the ability of a person to describe, for instance, events in a clear, coherent fashion so that other people who might have to make decisions based on the reports that this fellow has submitted can understand exactly what happened.

They are different although there is an element, let's say, of clerical operations in the report preparation sub test.

Q You previously testified that the determination of K, S and A for a given examination was your responsibility or the test constructor's responsibility.

Why did you both or instruct your subordinates to compare the job K, S and A with the test K, S and A,

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let's say the universe that is being tested as in content validation, it could be some external criterion in terms of criterion related validation, or it could be some other measures of certain, let's say, underlying psychological traits, or something like that, ~~and~~ perhaps construct validation.

Q Are content validation, construct validation and criterion related validation three separate processes?

A It is my own personal opinion they are not, that they represent a process. However, it is fairly clear that other authorities view them as being separate and distinct things.

Q Would you tell me how you view the three kinds of validations?

A In what way?

Q You said you view them as all part of one process, as not three separate processes?

A Right, that would be correct. I view it as a validation process whereby, for instance, in this context, in the absence of any suitable criterion measure of job performance, we are put in the position where content validation is the one most appropriate. It is a piece of the process that is most appropriate for this given examination.

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you were setting out to do this work and, indeed, through the course of the work. One of them was visits to a facility.

Can you tell me what you looked for when you visited a facility in reference, of course, to your work in test construction?

THE COURT: I thought he had done that once.

A I think we had talked about in terms of what I had done when I went to Coxsackie, Matteawan. I talked about the idea of looking at who did what, why he did it.

THE COURT: Isn't that it?

MRS. GORDON: That is it, essentially.

I think that is all, your Honor.

CROSS EXAMINATION

BY MRS. GREENBERG:

Q Mr. Siegal, are you familiar with the term "test validation"?

A Yes.

Q Would you please indicate to me your understanding of that term?

THE COURT: What he understands it to mean?

MRS. GREENBERG: Yes.

A Test validation would be the process by which a test is related to something else. It could be to the --

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(In open court.)

K E N N E T H S I E G A L, resumed.

MRS. GORDON: Mr. Baller, have you finished with your voir dire on that point?

THE COURT: I guess he has. I ruled in his favor.

MRS. GORDON: I would like to establish one or two points with respect to Defendants' Exhibit S. It is just for the record. I am not asking your Honor to change his mind at this point. I think it would be relevant.

THE COURT: I am not clear that I understand whether you are trying to remedy the problem that I specified or whether you simply want to ask Mr. Siegal some questions in relation to the subject matter. You can ask him any questions you want to.

MRS. GORDON: It is in relation to the subject matter, your Honor, not with respect to bringing somebody down to testify as to how -- what method they used.

THE COURT: All right.

DIRECT EXAMINATION (CONTINUED)

BY MRS. GORDON:

Q Mr. Siegal, were you aware at the time you constructed examination 34944 that sergeants performed certain clerical duties?

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A Yes, certainly.

Q Why didn't you put a clerical sub test on the examination?

A Well, in developing an examination, the question of importance always comes into play. I don't think that we had any indication, let's say, that a person who perhaps can perform certain basic clerical functions may be a little bit faster, may be a little bit neater, or something like than, than another person makes a better sergeant in any way. Certainly the report preparation sub test deals in some way with clerical operations. However, it gets at the ability of a person to describe, for instance, events in a clear, coherent fashion so that other people who might have to make decisions based on the reports that this fellow has submitted can understand exactly what happened.

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let's say the universe that is being tested as in content validation, it could be some external criterion in terms of criterion related validation, or it could be some other measures of certain, let's say, underlying psychological traits, or something like that, as well as construct validation.

Q Are content validation, construct validation and criterion related validation three separate processes?

A It is my own personal opinion they are not, that they represent a process. However, it is fairly clear that other authorities view them as being separate and distinct things.

Q Would you tell me how you view the three kinds of validations?

A In what way?

Q You said you view them as all part of one process, as not three separate processes?

A Right, that would be correct. I view it as a validation process whereby, for instance, in this context, in the absence of any suitable criterion measure of job performance, we are put in the position where content validation is the one most appropriate. It is a piece of the process that is most appropriate for this given examination.

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The other pieces of the process can come at a time when the necessary, for instance, criteria are in existence.

Q Is the process of validation complete if only one process of validation is done?

A The process of validation is never complete. In the context in which we work, such as employment testing, we are testing for a job. There is no question that the jobs change. Therefore, the test must in some way be related to the performance of people on the job as it exists at the time you are testing.

To validate a test in 1950 and then use it for the next four hundred years is ridiculous.

THE COURT: May I see if the parties agree on these propositions, because I am very much interested in philosophy in my off hours but here I would loke to see if we can't keep it as specific as possible.

I take it that everybody would agree that whether we call it one process or several processes, the more validations that are applied to a test the greater the chance of resulting in affirmative results, the greater the chance the test is valid?

THE WITNESS: In general, yes. Again, it depends on what context you are talking about. Some places

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talk about content validity and say that is enough.

THE COURT: I didn't say that. I said if there were content validation and so forth and they all show the test to be valid, there would be a greater likelihood that the test was valid than if merely one of them was performed. You are saying some people might think it was only necessary to perform one, is that right?

THE WITNESS: That's correct.

THE COURT: But I don't suppose it would be negative, if they were all performed the chances would be at least as good and perhaps better?

THE WITNESS: All input is helpful.

MRS. GORDON: Your Honor, I am not too clear about this myself, but I think that in the most sophisticated approach to this type of thing there are certain types of tests that are, let's say, only amenable to construct validation as opposed to content validation. I am not sure myself.

THE COURT: As to this test, my impression is that the parties agree that all of the types of validation that have been discussed, have just been asked about by Mrs. Greenberg, would be suitable for the validation of this test if they could be performed.

Do you agree with that, Mr. Siegal, or not?

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THE WITNESS: Well, for instance, the questions that are asked in determining content validity, as to whether or not you have a reasonable sample of the universe of items, and so on, could not be demonstrated by doing criterion related validity study.

THE COURT: That isn't what I said. Maybe I don't understand the subject adequately but if I don't then I have to come to understand it and I have to ask these questions.

I understand that there are various methods of validating a test which include content validation, construct validation, criterion related validation.

Am I correct in that?

THE WITNESS: Yes, sir.

THE COURT: I thought I understood that the reason for not, or a reason, anyway, for not having attempted a criterion related validation of this test, this particular tests, was that you had not yet developed a criteria by which you could accomplish that.

Is that correct?

THE WITNESS: That is certainly one of the reasons, yes.

THE COURT: I thought I also understood that it was agreed that if the three tests, content, construct and

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criterion related, if the material necessary for that was available they would all be methods of testing this particular 34944.

MRS. GREENBERG: That is not plaintiffs' position, your Honor.

THE COURT: You do not agree?

MRS. GREENBERG: No.

THE COURT: Then will each of you tell me what your positions on that are?

MRS. GREENBERG: Yes. Our position is that the purpose of the correction sergeant's exam is to predict performance in the job of correction sergeant, that the best kind of test to give to predict performance is a test which has been proved predictively valid or criterion relatedly valid.

THE COURT: That is the best, but are you saying that these other methods of validation are not appropriate methods of validating this test?

MRS. GREENBERG: According to the guidelines and the professional standards, in some situations other kinds of validation may be appropriate but we prefer to let our expert testify on that subject.

THE COURT: What is your position on these points, Mr. Siegal?

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I don't care if you want to answer it, Mrs. Gordon.

MRS. GORDON: We disagree with plaintiffs' analysis that criterion validation is the highest, shall we say, form of validation. We further note that there is disagreement in the field of employment testing, particularly in government, civil service employment testing, on the question of whether or not criterion validation should even be done.

Obviously, however, our people have gotten a federal grant to do criterion validation and are now engaged in that effort. It is obviously the purpose of that study to see if it can be successfuly accomplished.

Other jurisdictions, notably the Federal Civil Service Commission, don't agree with that. They go on a different type of model unconcerned with criterion validation.

Our further position is that this type of test was amenable and, indeed, very appropriate to content validation method and was appropriately content validated under professional standards.

Mrs. Greenberg made reference to the APA guidelines ant the EEOC guidelines. Obviously, the plaintiffs read them as requiring criterion validation. The court

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will read them, and I am sure hear testimony on them. Obviously we do not read them as requiring criterion validation in this context.

MRS. GREENBERG: I would like to further clarify our position, your Honor.

It is a further part of our position that even if another kind of validation were appropriate in this circumstance, these tests have not so be validated.

THE COURT: That is another matter. Thank you.

BY MRS. GREENBERG:

Q Mr. Siegal, in your deposition which was taken on June 26, 1973, I would like to read from page 14.

"Q Do you feel that one type of validation of the three that you mentioned is better suited for determining the validity of a predictive selection process?

"A Again, I believe you are trying to divide the validation process into separate and distinct parts and I think I have already said that we cannot really do that. It's a complete process.

"Q Is the validation process complete if only one form of validation is done?

"A The process of validation includes or should include content, construct and criterion. Does that answer the question?"

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THE COURT: You have read him the testimony. what is your present question?

Q That seems to be contrary to what you have just said. You have just testified you can do one kind of validation but later on you may want to do another kind of validation.

MRS. GORDON: I except to that, your Honor.

THE COURT: That is a statement, Mrs. Greenberg. Are you asking him: Can you reconcile your statement now?

Q I would like to know whether you can reconcile your testimony with your testimony on the deposition.

MRS. GORDON: I object to this on the basis that it's not at all clear that the witness made two different statements.

THE COURT: Without my meaning to imply that it is inconsistent, would you clarify for me the relation of what you have just said to what was just read from your deposition?

MRS. GREENBERG: Perhaps I can ask another question.

THE COURT: Let's stick to one thing at a time.

MRS. GORDON: Can we have the first question back or the answer?

THE COURT: Just a minute. It is getting very

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confused here.

Mr. Siegal, do you understand what I just asked you?

THE WITNESS: Yes.

THE COURT: Would you please, to the best of your ability, do that, clarify for me how what you have been saying in the recent discussion relates to what Mrs. Greenberg read from your deposition?

THE WITNESS: I am not sure it is in disagreement, the terminology of process or completeness or whatever.

As I said before, the idea of whether or not something is content valid or has validated along content lines, or whatever you wish to call it, can be demonstrated certainly without doing the other pieces in a process. It seems to me that with my very minor understanding of all the laws and decisions relating to this that in some cases that portion of the process, what I would call, what I believe to be, a portion of a process and what other people would call a completed process of some kind, all right, is sufficient, all right, to meet certain standards and guidelines, and the fact that, as we discussed, the fact that we would continue to try to do other forms of validation, all right, or other pieces of the process, all right, in no way detracts from the idea that the test itself may be

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content valid.

Q Is it your view that the validation of examination 34944 is now complete?

A No.

THE COURT: I want to get a concept in my mind straight.

I gather you are distinguishing between completeness of validation and adequacy of validation. Is that right?

THE WITNESS: I think that would be an accurate description.

THE COURT: What you are saying, if I understand you, you agree there may be several ways you can validate this test but you feel you can adequately validate the test by applying one of them?

THE WITNESS: That is correct.

THE COURT: When I say one, the content validation.

THE WITNESS: That is correct.

Q Is the purpose of the sergeant's examination to predict which persons will perform better as correction sergeants?

A It is to select a pool of candidates which represents those people who should perform better on the job.

Q Do you feel that one of the three types of validation

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which we have discussed is better suited to selecting persons who will do better on the job than the other two?

A It depends to some extent on the things that you have to measure and how you are going to go about getting at those things. There are many instances, and this certainly is in part -- does in part fall into this category, where the feasibility of doing, for instance, criterion related validation or that piece of the process or other types of validation or pieces of the process are impossible, all right, in which case they obviously could not be done.

The existence of our IPA project and the attempt that we are going to make to prepare a criterion related valid examination for the correction officer series I think is an indication that we are certainly attempting to use this method of criterion validation.

Now, for me to say at this point what the result of that will be and whether or not that study will show that that method is better than the method that was used in 34944 is asking me to make predictions about what is going to occur. I don't know.

Q How will you determine whether it is better?

A Well, certainly the question of whether or not we are able in any way to prepare a valid performance criterion will determine whether or not we can ever relate any

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examination or testing procedure or process to it. That is certainly the first piece.

If that cannot be done, then there is no way that we can demonstrate or attempt to demonstrate that an examination is criterion related.

Q And I take it without a criterion you cannot demonstrate that one selection method is better than another?

A The point is this, that as we mentioned before, these are things that we would try to do. I don't know any way that we can compare the result from content validation piece or portion which involves judgment as to whether or not items are selected that represent a universe, and so on, and the empirical studies of relationship between an examination and a criterion.

As I think I mentioned before, correlations between an examination and a criterion demonstrate in no way the content validity of an examination.

Now, how it would be possible to then compare results based on judgment as opposed to numbers, I don't know.

Q Then how are you going to compare the results of your criterion related examination to the results of your content, so-called content, validation?

A It is clear to us that we have already demonstrated,

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although that will be determined here, I suppose, that the test we have constructed, namely, 34944, is content valid and, as we mentioned before, the additional pieces of information that we would get about its relationship or possible relationship to some job performance criterion would be additional pieces of information.

THE COURT: Criterion related in this case would mean the relationship of a man's accomplishment on his job with what he did on the test, is that right?

THE WITNESS: That is correct, however that accomplishment is measured.

THE COURT: I wish we could use plain English for some of this.

Q If you cannot develop a criterion, does that mean you cannot tell good performance from poor performance?

A That means that we cannot devise a scale or rating form or something which is a valid measure of performance. I think there is a difference between saying that we cannot get an indication of how a man is performing and saying that we can devise a scale that is valid under the APA guidelines, all right, that can produce numbers of some kind that can be empirically related to test results. I think they are two different questions.

Q Why are you conducting the criterion related study?

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A We in New York State try to keep as up with the times as possible and do things that are good and wonderful and everything else. We have recently acquired certain electronic data processing capabilities in terms of new programs, and so on. We certainly want to attempt and test out the feasibility of doing a criterion related validation study, something to that effect.

In addition, our department within the past year or so went under reorganization which divided up responsibilities and whatnot into several different areas. This methods approach project is also an attempt to analyze the project approach to the preparation of examinations and their validation, and it is because of these several reasons that we are involved in the project.

Q Do you think that if you are successful in developing a criterion that you will then have a better test for selecting correction sergeants?

A If you are asking me if I prepare an examination that is only shown to be criterion related, all right, and has not been shown to be content validated or construct validated , whether that porition of the process is better than the portion of the process that we have called content validation, I will not make a judgment as to that.

Q In other words, you are saying if you develop a

test that is shown to be predictively valid, that will not be sufficient validity.

THE COURT: I didn't understand that to be the answer to the question. You can ask that question.

Q If, as a result of this project, you develop a test which is predictively valid, would you consider you have an adequately validated test for selection correction sergeants?

A We will have a test that has been validated for the selection of correction sergeants.

Q That wasn't my question.

THE COURT: Mr. Siegal, I would like to ask you something.

As I understand you to have said earlier, you do believe that the content validation has been adequate.--

THE WITNESS: Yes.

THE COURT: -- to validate in your mind this test.

THE WITNESS: That is correct.

THE COURT: I think Mrs. Greenberg is asking a fair question. She is asking if you have a criterion related validation of the test, would you consider that alone adequate as you seem to have considered the content validation adequate?

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THE WITNESS: Sir, I think when I talked about adequacy I talked in terms of legal considerations, as to whether or not that is considered sufficient. I don't think I want to say in any way that I would ever stop looking at an examination and validating an examination.

As I said, the process is never complete. We don't stop at that point. I would be satisfied if I got meaningful results in a criterion related study. I certainly would be happy about that and would feel confident in using the examination, but that doesn't mean that the process stops.

THE COURT: Nobody was saying it did.

Q If you developed a test in which there was a significant correlation between performance on the test and performance on the job, that is, the people who did well on the test did well on the job and the people who did badly on the test did badly on the job, would you consider in your professional judgment that that was an adequate test for selecting correction sergeants? I don't mean legally adequate, I mean that it would satisfy you.

A Well, again, with the supposition that the criterion itself has been validated according to certain guidelines, the demonstration that test performance is related to some valid measure of job performance, it certainly would be some measure of criterion validity.

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THE COURT: I don't think you are answering the question. I think Mrs. Greenberg asked a plain, simple question. If you came up with a test which over a period satisfactory to you showed that the people who did well on the test did well on the job and the people who did badly on the test did badly on the job, would you in your professional opinion, forgetting all guidelines or lawsuits, feel satisfied that such a correlation as I have described was an adequate validation of the test at some level?

A Certainly at some level, depending on a lot of other things.

THE COURT: If only half the people did well, it would be one thing, and it would have to depend --

THE WITNESS: It would depend on the degree of relationship between these things. That would certainly have to come into play. I can show relationship between two things on a very low level, or there can be a high correlation between two things, and certainly that would play a role in determining my satisfaction with this process.

THE COURT: Then there is nothing in the nature of criterion validation which would lead you to believe that you could not as adequately validate a test in that manner as you could content validation, is there?

THE WITNESS: I am not sure I follow that.

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THE COURT: I can understand that you would have to admit that if for a period of ten years everybody who took this test and did well on the test did well on the job and everybody who did badly on the test did badly on the job, it seems to me you would be forced to recognize that you had a high degree of criterion relatedness there.

THE WITNESS: Yes.

THE COURT: And that the test was valid, right?

THE WITNESS: To a large extent, yes.

THE COURT: You mean if every single person -- let's try to get this down.

THE WITNESS: There are several factors that come into play. In this type of situation, those people who failed the test are not appointed to the job, so you get no indication of their performance. Therefore, you are only looking at those people who have been selected.

In addition, we use the term "good performance," "does well on the job," "does better on the job." In order to do a criterion related validity study, you have to define that in operational terms. What does that mean? Does that mean he hasn't shot anybody recently or does it mean he has 412 commendations or does that mean --

THE COURT: Of course you have to do those things. We are assuming that you develop a method of describing what

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good performance is and that you find that there is good performance on the part of the people.

THE WITNESS: It certainly would be an excellent thing to have.

THE COURT: On the other end, if you find that everybody who took the test and did well did poorly in accordance with a predetermined definition of poorly on the job, you would be likely to conclude, I suppose, that the test was not valid.

THE WITNESS: Right.

THE COURT: Now, what I conclude from that, then, is that the ability of a criterion related process or part of a process to test the validity of a test is not affected by its own nature, that is, what it is you are doing, comparing job performance with testing accomplishment, but it's usefulness depends on the definitions that you apply and the facts that come from the application of criteria themselves, is that right?

THE WITNESS: That's correct.

BY MRS. GREENBERG:

Q Just to follow up on the court's question, suppose you developed a test and it was not predictively valid or there was an inverse relationship between performance on the test and performance on the job, what would you do?

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A Well, if there was a strong negative correlation between performance and test scores, it still might be very useful as a predictor. Now, it couldn't be used in the same way that we use it now.

Q You would start ranking from the bottom?

A Right. O.K. That can be done with negative weight.

Q Take a situation where there is not a negative correlation but there is not a sufficient degree of correlation for you to be able to say the test is predictively valid. What would you do with the test after you develop it if it turns out to be the case?

A If our attempt was to prepare -- if we were preparing a test that is supposed to be criterion related, all right, and if we prepared something, we had a valid predictor, we had a valid criterion, and the test does not predict that performance, we would not use the test for that selection.

Q Are you going to attempt to validate by the criterion method the test number 34944 after you have developed a criterion?

A I think, as I said in my deposition, the purpose of the development of the criterion and everything else and certainly primary focus in that project is on the entrance level position because what you get in at the beginning

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determines to a large extent the people you can have on supervisory levels.

We are going to do a criterion related validity on those exams. Now, we are not specifically -- the study is not specifically designed to criterion validate any prior examinations. It is not set up in that way. It is the construction of new items and new tests.

Q I understand that, but will you attempt to just perhaps to satisfy your own curiosity, to see how well you have been doing in terms of prediction, try to validate 34944 on the basis of the criterion for sergeants that you develop?

A There is a possibility that something like that could be done. However, depending on, one, the nature of the criterion, number two, the time at which we are able to get measures of job performance and the number of people in the samples that we are looking at in terms of getting performance ratings on, certainly we are not going to look at everybody in every facility initially, all right, depending on the size of the sample, of that sample, who had taken prior sergeant examinations, would to a large extent affect our ability to get any sort of meaningful result out of a correlation between that old examination or 34944 with this criterion that will be developed in the future.

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There is a question of certainly if we get numbers a year from now which are supposedly measures of performance and we have test score numbers, we can do correlations between them. But the relevance of those numbers to determining whether or not 34944 is actually or was at this time criterion related or for my own edification or what have you will depend to a large extent on exactly who we are getting performance measures on and when, and so on.

THE COURT: Are you confused enough to be willing to go to lunch, Mrs. Greenberg?

MRS. GREENBERG: I am cold enough.

THE COURT: I am sorry about that. We will adjourn at this time and resume at 2:00 o'clock.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 P.M.

(In open court.)

K E N N E T H S I E G A L, resumed.

CROSS EXAMINATION (CONTINUED)

BY MRS. GREENBERG:

Q Mr. Siegal, you described on your direct examination the development of the scope statement for examination 34944. Would it be correct to say that the scope of an examination is a statement of the subject matter to be covered?

A It's a general statement of the areas to be covered.

Q Is that the first step that one takes in the development of an examination?

A It may be the first definitive step which is agreed on by members of Civil Service and, say, Correction, but certainly bring with them a variety of other things.

Q Is it the first formal step one takes?

A I would say so, yes.

THE COURT: The first written document?

THE WITNESS: After the request comes in.

Q Would you tell me again what documents you or the other consultants used in determining the scope of

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examination 34944?

A Well, I think I said at some point, perhaps in my deposition, that I was not sure of what documents anyone else had looked at. For myself, I had looked at the job audits and class specifications, prior examinations, exam material, and I had some knowledge of the field which I had gathered by preparing other exams.

Q Did you look at prior examination announcements?

A Yes.

Q Do you remember which ones?

A I know that I had looked at the exam announcement for 1970.

THE COURT: You are talking about sergeant in this case?

THE WITNESS: That's correct.

A (Continued) Other than that, I am not exactly sure which ones I had seen prior to the scope conference.

Q You said that you looked at class specifications. Which class specifications did you look at?

A I looked at class specifications for the correction officer series and the later titles.

Q Did you look at the 1972 specifications?

A I looked at the specifications that we had. I believe they were 1972 at that time. I looked at any

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revision that came afterwards, and I had previously looked at other forms of the class spec.

Q By other forms of the class spec, what do you mean?

A For instance, during the course of preparing other examinations, I had looked at class specifications for those titles. Certainly some of them were prior to March, 1972. So whatever specs were in existence at that time I had seen.

Q You also said that you looked at prior sergeant examinations.

A I think I said that in a total form I had looked at the 1970 examination and that, in addition, I looked at the questions that we had in existence in our own files. Now, they were not set up in a specific test framework. It didn't say all these questions were used in 1968. There were a variety of questions in sub tests.

THE COURT: When you develop questions you don't use, do you keep them in the file and sometimes consult them later?

THE WITNESS: Definitely.

MRS. GREENBERG: I would like to have marked for identification Plaintiffs' Exhibit 43.

xxx (Plaintiffs' Exhibit 43 marked for identification.)

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MRS. GREENBERG: Plaintiffs' Exhibit 43 is a document provided to us by defendants entitled "Descriptive material and documents submitted pursuant to agreement between the attorneys."

There is set forth on page 2 a description -- well, under the heading "Correction sergeant examinations between 1964 and 1972 may be briefly described as follows," there is set forth some material. I would like to show this exhibit to Mr. Siegal.

Q Mr. Siegal, are the three subparagraphs in paragraph 2 of this exhibit scope statements for examination 34007, examination 32915 and examination 1439?

THE COURT: You mean the scope statements, are they questions from those respective examinations? They are not the examinations.

THE WITNESS: They are scope statements as would appear on an announcement for any one of these particular exams.

MRS. GREENBERG: I have a problem that page 3 of this document is almost as illegible as it was on the copy that was provided to us.

THE COURT: This one doesn't seem to be too bad.

MR. BALLER: May I suggest we use this as the official court copy?

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MRS. GORDON: I docketed the original. Perhaps the court has it.

THE COURT: I don't have it in my papers on the bench here, but, Mrs. Greenberg, why don't you use that and substitute the tag. I think the page you are talking about is actually the fourth page.

MRS. GREENBERG: The fourth page of one and third of another.

Q I am showing you what is the fourth page of Plaintiffs' Exhibit 43 marked for identification. Can you tell me what this document is?

A Well, it appears to be a class specification for what was then known as the prison custodial series, which appears to be dated I think in 1958, but I am not sure.

Q You are not sure because you can't read it?

A July, 1956, I believe is the date of it.

Q The next document in this exhibit, can you tell me what that is?

A This appears to be -- it says correction officer series, and it is the class specifications for the series and it seems to be dated June, 1962.

Q The next document, which is Exhibit 3B to Plaintiffs' Exhibit 43 for identification, can you tell me

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what this is?

A This appears to be class specifications for the correction officer series and it's dated March, 1964.

Q And the next document, which is Exhibit 4B to Plaintiffs' Exhibit 43?

A Again class specs for the correction officer series, this one dated June, 1967.

Q And the next document, which is Exhibit 5B to Plaintiffs' Exhibit 43?

A This is the class specifications for the correction officer series, and it is dated September, 1971.

Q Are these specifications some that you consulted in the course of drafting the scope of examination 34944?

A I am fairly certain that I saw the one that was dated 1971. As far as the other ones are concerned, I know I had at one time or another seen prior class specifications. As to exactly which ones they were, I can't specifically recall.

MRS. GREENBERG: I would like to move Plaintiffs' Exhibit 43 into evidence.

THE COURT: The entire thing?

MRS. GREENBERG: Yes.

THE COURT: Any objection?

MRS. GORDON: Well, if it serves the court's con-

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venience to have it in this form, I have no objection. I have no objection.

THE COURT: All right, received in evidence.

(Plaintiffs' Exhibit 43 received in evidence.)

MRS. GORDON: By the way, your Honor, I would comment on Exhibits 1B and 2B to this document. I compiled this set of materials in Albany, and I made strenuous efforts to try to get a clear xerox copy. I could hardly read the one that I had in Albany and I am sorry I can't do much better with the xeroxes.

THE COURT: Can ask any lawyer to do better than their best.

Q After you consulted all the various documents that you stated that you consulted to determine the scope of examination 34944, did you conclude that the job of correction sergeant had changed since the 1970 examination was given?

A I had seen the examination for 1970. Since I wasn't working in the department at the time, I was in service, and I am not familiar with what was going on, it was not clear to me -- let me try it again.

I tried to establish what the job of correction wergeant was. I was not necessarily comparing it as to the difference, what it had been in the past.

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THE COURT: So you didn't reach any conclusion on that point?

THE WITNESS: That wasn't the object of my investigation.

Q Is it correct to assume that since the scope statement of the 1972 examination was identical to the scope statement of the 1970 examination with the exception of substituting a sub test called written reports for a sub test on interpretation of written materials --

A Understanding and interpreting written material.

Q -- that you concluded that the job had not changed?

A No. The scope statement gives an indication of what the test is going to be like. It does not necessarily reflect or is not necessarily an accurate reflection of changes that had occurred in the job. If there were large material changes which might be reflected in testing for a different group of K, S and A's, this might be reflected in the scope statement. But merely by looking at the scope statement you can't make a determination like that.

Q Did you determine that there were no large, substantial changes in the job?

A From when to when?

Q From the time of the 1970 examination to the time of the 1972 examination.

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A As I said, I was primarily concerned with finding out what it was at that point. I was not really concerned with what it had been at that time.

Q I assume that the similarity between the 1972 scope statement and the 1970 scope statement was more than a mere chance.

A Certainly.

Q You looked at the 1970 scope statement and decided that the 1972 scope statement -- that the 1972 exam should cover the same general subject matter areas?

A Well, except for the report preparation for reading comprehension I decided that that scope would be sufficient for that job.

Q You just testified that the scope statement would only be changed if there were substantial changes in the job, is that right?

A I am not sure if that is what I said.

Q Would that be a correct statement?

A To some extent, yes. There may be other things that would change or affect the scope of the examination, not necessarily reflected in a major alteration in the job itself. There might be a change in, say, perhaps the type of individual the department was looking for, or something else.

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Q If there was a change in a job, it could result in a change in the scope statement?

A It could happen.

Q Could you have a substantial change in the job and not change the scope statement?

A It would be possible, yes, under certain circumstances.

Q Under what circumstances?

A If the knowledges, skills and abilities that were important to the job as it existed in one point in time were the same set of knowledges, skills and abilities important to the job at a later point in time, a lot of other things could change on the job without necessarily affecting the things that you considered important and things you wanted to test for.

Q But aren't knowledges, skills and abilities determined after the scope of the examination is determined?

A It is to some extent but not completely. To the extent that people have an idea as to which knowledges, skills and abilities they want to test for or it might be possible to test for, all right, and during the process of selecting items we select those K, S and A's that are most important to the job.

Q When was the scope of the 1972 examination

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determined?

A The discussion revolving around the scope was at the June 1, 1972, conference.

Q Was there any discussion at that conference of the K, S and A's?

A There were discussions that related to those topics, but I don't specically recall the exact nature of the comments made.

Q I would like to show you Plaintiffs' Exhibit 9. Would you tell me what that is?

A This is a memo from Mr. Don Etter to the record with regard to the meeting with the Department of Correctional Services that was held on June 1, 1972.

Q Was that meeting the scope conference?

A Yes.

Q Would you point out to me in there any mention of a discussion of K, S and A's for the 1972 sergeant's examination?

A I do not see any indication in here of that.

Q After the scope statement was prepared, was the next formal step in the construction of 34944 the drafting of the K, S and A's?

A The next formal step -- There are several different operations that are going on at the same time.

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One is a checking with the operating agency through the tentative announcement to get their agreement as to the scope of the examination, minimal qualifications, and so on, and at the same time the test developers are working on the construction of items and development of the K, S and A's for the test.

Q Is the development of the K, S and A's a matter of going from the more general scope statement to the more specific, that is, the K, S and A's?

A I don't know that that is necessarily the process. It is a selection from the possible things that you could be testing for.

Q In other words, would it be correct to say that for each part of the scope statement, that is, for each sub test title, you then determine certain K, S and A's that you will test for?

A In a general way, yes.

Q Would you briefly describe the process of drafting a K, S and A? Tell me what documents you would have, who you spoke to.

A The documentation of the K, S and A's involved the writing down of those things that have been determined during the course of job analysis, job audits, test construction, talking with experts, and so on. But the

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documentation of that at that point --

Q What process do you go through before you actually write it? In the process of drafting the K, S and A's, do you consult documents?

A Yes. As I say, the whole process -- the process is going through and selecting the K, S and A's, and the process of writing them down is merely the last step.

Q In the process of thinking about the K, S and A's before you write them down, do you consult certain documents?

A Yes.

Q What?

A As I mentioned before, the things that we looked at in relationship to the field and the job, such as job audits, class specifications, other reports relating to the job itself, discussions with people, visits to facilities, and so on. These are the things that relate to these things.

THE COURT: If you take a visit to a facility, there would be a document only if you made a report?

THE WITNESS: Certainly. It is not exclusively written documents.

THE COURT: I don't think Mrs. Greenberg asked you if it was. She asked you if you consulted some

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documents and, if so, what documents did you consult.

Q Did you consult previous K, S and A statements?

A I don't specifically recall consulting.

THE COURT: Does that mean there is any particular likelihood one way or the other that you did or didn't?

THE WITNESS: Let me say I have seen K, S and A statements for sub tests relating to the correction field. Exactly which ones, I don't know.

THE COURT: Is it your normal practice in preparing K, S and A's for a new exam to consult the K, S and A's for the prior exam?

A Speaking as an individual, I don't consider it necessarily part of my normal process. I don't know what other people do.

THE COURT: You can only answer for yourself.

Q How much importance did you place on the job audits, Defendants' Exhibit E, in drafting the K, S and A's?

A Again, they played a part in the process. I think I said in my deposition I can't really say which thing was most important or least important. Everything provided some kind of input.

Q What you said in your deposition was, page 49:

"Q Would you say you placed substantial importance on the documents identified as Exhibit 3A?

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"A That's the job audit from 1970, I believe.

"Q Yes.

"A A large amount of importance was placed on that."

THE COURT: Is that what you say now, too?

THE WITNESS: Yes. Again, it's a question of relative terms to other things --

THE COURT: I understand.

Q What use is made of the K, S and A statements?

A The statements themselves is -- primarily you say for use in this examination for documentation. What use is made by other people would depend on the circumstances.

Q Again referring to your deposition, page 36.

"Q What use is made of the K, S and A statement?

"A The K, S and A statements are used as guidelines, in effect, in preparation of particular items or of items in general on -- in that they represent the -- the K, S and A statements represent those relevant portions of the position, let's say, which we wish to test and therefore act as a guide in telling us the types of items to write or select."

Would you agree with that now?

A Yes. I think the question you asked me before --

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I assume was referring to the documentation of the K, S and A's. I am a little confused.

Q The question before I believe was what use is made of the K, S and A statements. Perhaps you misunderstood what I meant. Would you agree with the answer you gave on your deposition?

A Yes. It is to a large extent a concurrent process, certainly in this case, where we are both preparing individual items, all right, and selecting K, S and A's.

Q Were you preparing individual test items before the K, S and A's were completed?

A We have three individuals who worked with us who were working in the department. In our discussions with them we discussed the job. We asked them to prepare items, and in the process of their giving us items they brought to light certain relevant portions of the job.

Q So some of the items that were on the exam were prepared before the K, S and A statements were prepared?

A Yes, I would think so.

Q I believe you testified before that you participated with consultants from the Department of Correctional Services in the preparation of items for three of the sub tests.

A That's right.

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Q Modern correctional methods --

A Practices, laws, rules and regulations sub test and the correctional judgment sub test.

Q What documents did you and, to the best of your knowledge, the consultants from the Department of Corrections use in the course of preparing the items?

A Well, each sub test, as I mentioned before, I think, the questions relating to laws, rules and regulations had to pertain to those specific laws, rules and regulations in the department. You want me to go on with that?

Q Sure.

A The section on modern correctional methods and practices, I know that we reviewed standard test materials, Manual of Correctional Standards and various other documents. These are things that I myself looked at. Now, there were other documents that were looked at by the consultants. Some of them were mentioned to me, others were not.

The situational judgment questions related primarily to situations which would be based to a large extent on prior experience. In those questions related to specific sections of law or what have you, certainly those pertinent sections were looked at.

Q Did you consult the job audits?

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A In terms --

Q In formulating the questions.

A I don't recall specifically looking at a job audit in relation to an individual question.

Q Among the documents you looked at, did you look at the McKay Commission report?

A I recall the McKay Commission report came out I think in September of '72 and we did obtain copies of them and we did review the material in there.

Again, I know I looked at it and my staff looked at it at or about the time we were preparing questions.

THE COURT: You are talking about it as a kind of general reference, is that right, like the job audits?

THE WITNESS: There are elements in there. There are also other things in there. For instance, there is a discussion of the department as it exists, what the problems are, and things like that, and that could relate to, for instance, the types of situations that we wanted to frame questions in.

THE COURT: I understand that, but in an answer a short while ago, as I understood you, you said you didn't remember looking at the job audits for any particular question but you had consulted the job audits as a general item of preparation.

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THE WITNESS: Correct.

THE COURT: Is that the same kind of use you made of the McKay Commission report or did you use that more specifically?

THE WITNESS: I know that we attempted to use the McKay Commission report in a more direct way in terms of formulating questions. Again, I am not exactly sure when we got our copies of the book and whether or not we had enough time to prepare items directly related to it.

Q I would like to read a short paragraph from the book entitled "Attica, The Official Report Of The New York State Special Commission On Attica."

THE COURT: That is the McKay Commission report we have been talking about?

MRS. GREENBERG: Yes. On page 26.

THE COURT: I take it you are reading for the purpose of asking a question.

MRS. GREENBERG: Yes.

Q The last paragraph on page 26.

"For promotion, evaluations of an officer's performance on the job and his ability to relate to inmates were not considered. Written examinations were the key, and after three years service any correction officer could take an exam for sergeant.

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For each succeeding rank, including superintendent, the examination could be taken only after one year's service at the preceding level."

Do you consider that statement a criticism of the promotional system in the Corrections Department?

THE COURT: May I ask what the relevance of Mr. Siegal's opinion on that would be?

MRS. GREENBERG: Because he was the person responsible for developing the selection procedure for sergeants, and he said he consulted the McKay Commission report, among other things, in developing his selection procedure, I would like to know what importance he placed on --

THE COURT: You can ask him whether he felt there was any importance to that statement in preparing the exam.

THE WITNESS: Is that the question?

THE COURT: Yes.

THE WITNESS: I know that I looked at that and certainly I considered the statement. I am not sure exactly about the context here, but I don't think the statement is necessarily a criticism of the process.

THE COURT: That is the question I thought was irrelevant. What might be relevant was whether, after

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having read that, did it have any influence on your framing of the examination.

THE WITNESS: I would be hardpressed to say whether that particular statement was considered. I don't really know.

Q Are evaluations of performance sometimes given a rating? In a selection procedure in New York State, are evaluations of performance sometimes given a weight in the selection procedure?

A I think --

Q I am not talking about seniority.

A I realize that.

MRS. GORDON: Are we talking about any title series or correction officer series?

MRS. GREENBERG: In any title series in New York State.

THE COURT: Any kind of selection or appointment or what? I am confused.

MRS. GREENBERG: Any kind of competitive selection.

THE COURT: All right.

A My understanding is that the law allows for some type of promotable rating, let's say, to be used in a promotion process, let's say. I do not specifically know of any time that something like that has been used.

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Q Did you consider using supervisory evaluations as part of the selection process for correction sergeant in the 1972 examination?

A I certainly considered it. As we saw in our early work with the correction officer examination, in early '72, there is a very distinct problem in trying to generate a rating scale of some kind. As a result, we did not decide to use it.

Q What is the problem?

A Pardon?

Q What was the problem generally?

A The basic subjective nature of a rating scale, the allowance -- the possibility of individual subjective viewpoints that come into play.

Q Is one of the problems of developing a rating scale it would take a considerable amount of time?

A That certainly would be one element.

Q Were you under a great deal of time pressure in preparing this examination?

A Yes, I think that would be an accurate statement.

Q Plaintiffs' Exhibit 5, which is the eligible list resulting from examination 34944, indicates that the examination was held October 14, 1972, and the list was established March15, 1973. Five months elapsed between

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the holding of the examination and the establishment of the eligibility list.

THE COURT: Are you just bringing that to my attention, Mrs. Greenberg?

MRS. GREENBERG: Yes, I am.

MRS. GORDON: Your Honor --

MRS. GREENBERG: May I finish my examination?

MRS. GORDON: I except to that unless plaintiffs have some claim that the date the list is established has some relevance to this action.

THE COURT: I will accept Mrs. Greenberg's statement that the exhibit shows that. The question of its relevance she will have to establish when she argues it or briefs it. I don't know what she has in mind.

I think it would be helpful, unless it relates to a question you are about to ask, if we reserve all such points to summation or something like that.

Q Let me ask, Mr. Siegal, you testified one of the problems in preparing a rating scale for supervisors' evaluations, as you said on page 45 of your deposition in the second complete paragraph:

"Given the time limitations we were under for this particular examination, the number of provisionals and so on, it would have been, I think, impossible to

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prepare an adequate training and experience rating scale for this examination."

Is five months as quickly as one under severe time pressures could prepare an eligible list from the correction sergeant's examination?

A We attempted to get the list out in the shortest amount of time possible. We had several problems in our department at that time with computer breakdown, the machine that scores the answer papers broke down, the unusual volume of candidates, appeals and so on. We certainly made every attempt to get the list out as quickly as possible.

Q You testified yesterday that there were some questions on the sergeant's exam that were not specifically related to the sergeant's job.

MRS. GORDON: I except to that, your Honor. I just want it on the record.

THE COURT: I would say they are not specifically related in the sense they would only be asked of persons going into a sergeant's job. They would be asked of other people also.

Q According to my notes, and you can tell me if I recorded it accurately, the court asked you why the first question in Plaintiffs' Exhibit 18, which refers to the

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appointment of the superintendent, was useful for a sergeant to know, and you responded, "Well, everybody knows that anyway. If the person can't put himself in the framework of an agency, I don't know that he can be as effective." Obviously these are brief notes. "Questions may not be specifically related to job sergeant does but sergeants must be able to answer questions from inmates and correction officers. Otherwise he looks foolish."

You went on to say that any question on law demonstrates that an individual has read the law, remembers it and can interpret it and this would be an indication that he could apply new law.

Does that convey the sense of your answer?

A Yes, I would think so.

Q I would like you just to point out to me some other questions which you feel don't specifically relate to the sergeant's job. I will start with Plaintiffs' Exhibit 18.

THE COURT: Let me make clear when I made the remark after you asked your last question and Mrs. Gordon made the objection, I assumed there was another class of questions. That class was in here, what one might call general questions, and I remember a discussion about the fact that those questions were used in other exams as well

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as in these exams. So that what I said is not inconsistent with what you just brought out about Mr. Siegal's answer about question number one.

A I would think question 13 in general would not be something that a sergeant would normally have to decide during the course of his duties.

Q Why is the question there?

A As I think I have mentioned, we are testing for a knowledge of the correction law and related rules and regulations, and we are doing this for several reasons and we are trying to get at several different things with relationship to that knowledge.

In addition, this material was used for the hospital positions where people might find this particular question, let's say, more closely related to their own job duties and the types of questions that they might be asked on the job, and so on.

THE COURT: In other words, this is an examination taken by people working in hospitals?

THE WITNESS: Yes, a portion of the exam.

THE COURT: At Matteawan or what?

THE WITNESS: Yes, the one facility. There was eligibility of hospital people to take line positions and line people to take hospital positions.

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THE COURT: Wouldn't question number two also fall into the same category as question number one?

THE WITNESS: Yes, I would think so.

THE COURT: The sergeant doesn't do anything in regard to that subject matter, does he?

THE WITNESS: Not usually, no.

THE COURT: What do you mean by not usually? He never has to decide where a facility will be built or anything of that kind, does he?

THE WITNESS: I don't recall of any circumstance where he did.

THE COURT: Is it conceivable? I don't mind your giving me qualified answers when an answer can be qualified, but I can't conceive of a sergeant having to do anything with the site for a facility. That must happen at a very high level in the department, doesn't it?

THE WITNESS: I would think so, yes. There are people who, let's say, have line experience as sergeants who might be involved in setting up a training course some place or an academy or residential treatment facility who might get involved as a member of a team in some way in doing something like that. In general, you are correct in your statement.

Q Does the department conduct any kind of training

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courses for correction officers and for correction sergeants or any other rank in laws, rules and regulations?

A The present 13-week sequential course for correction officers covers certainly the rule book and certain regulations and covers the law to some extent. Now, how deeply they go I am not exactly sure. I am sure the course changes as time goes on.

Q You mean as there are new laws and everything?

A New laws, plus the fact that they have had, I guess, about five or six training classes and the development of the training materials and programs is under some stat of flux. They do change, certainly.

THE COURT: Had that 13-week course commenced prior to the administration of 34944?

THE WITNESS: The first class was in March of 1972 and I think the next course was some time in September of '72. This was for new officers coming in.

THE COURT: So there was only one complete class before?

THE WITNESS: That is right, and none of those people would have beeneligible to take this test.

THE COURT: So it is irrelevant to this test?

THE WITNESS: Yes.

Q How did the officers learn the law before the

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13-week course?

A It is my understanding there are additional in-service training courses, some of which relate to knowledge of laws and regulations. Certainly each employee is charged with the responsibility of knowing the rules and regulations that pertain to the performance of his own duties and responsibilities of his post, and so on.

Q Do you hold training courses for people above the rank of correction officer?

MRS. GORDON: Does "you" refer to Civil Service?

MRS. GREENBERG: I am sorry. The Department of Corrections.

A It is my understanding they do provide some type of courses.

Q I just wonder why, if you give all these in-service courses, it is necessary to test someone's ability to interpret and apply new laws which is, in addition to being able to answer inmates' questions, the only justification you have given for including these items.

THE COURT: I don't think the question is whether it is necessary. I think there was a decision made it was something that should be included in the exam. If you would like to know that.

Q I would like to know what relationship or bearing

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this has on a sergeant's exam to ask questions intended to measure the sergeant's or prospective sergeant's ability to apply new laws if he is going to be trained in the new laws.

A I am not exactly certain that every sergeant that's appointed, certainly at any point in time, does receive a training course in laws, rules and regulations.

In addition, if such a course is given and he does take it once, it doesn't necessarily mean that he is going to be given a training course every time the laws are changed.

THE COURT: In addition to which, am I not correct even if he is given a training course you want to know whether he has absorbed what he was trained there?

THE WITNESS: That is certainly true. You want to have an idea as to whether or not he has taken this course, is willing and able to do this on his own, since you rely on the individual to learn certain things. You can't always expect them to be placed in a training program to teach them every new thing that is going on.

Q You say that you are testing him for content of courses that he has taken in the past, yet you say that these questions have no bearing on anything that a sergeant would have to do. Why do you ask them?

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THE COURT: Mrs. Greenberg, it does seem Mr. Siegal has answered the question. As to questions one and two, he has told me what his reasons are for including them. I may consider them poor reasons or good reasons, but I think he has answered that.

MRS. GREENBERG: I am sorry, Judge Lasker. It seems to me that Mr. Siegal has given me several reasons and they are not entirely consistent. One reason he has given is to test -- the last reason was to test how much of a training course has been absorbed, how much he has learned because it is important that he knows whatever is given in the training course. So presumably those questions are matters that were covered in the training course.

THE COURT: That was by hypothesis. There is no presumption of that.

MRS. GREENBERG: If part of the purpose of the examis to determine how much was covered in the training course, then you have to ask questions related to the training course. Yet since these questions or the subject matter of his questions has nothing to do with what a sergeant has to do, I am trying to establish there is no reason for them to be in a sergeant's exam..

THE COURT: Yesterday I asked that question and

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you read back your own very good notes of his answer, which was that he may look foolish among correction officers if he didn't know these things. Those are perfectly responsive answers to those questions. I may agree or disagree. Unfortunately, a witness is not required to give consistent answers. You are free to point up any inconsistencies at a later date.

MRS. GORDON: May I just note for the record that at least in my judgment counsel's line of questions was based on the hypothesis that if you give a training course, why do you then bother to put laws, rules and regulations on the test.

THE COURT: I will instruct you and Mrs. Greenberg not to interrupt each other in the line of questions. People are free to ask questions as they want as long as they come within the rules of evidence.

BY MRS. GREENBERG:

Q Would you tell me, Mr. Siegal, when you were preparing examination 34944, did you have what you would consider a job analysis to work from?

A Prior to the time that the examination was given, in the process of preparing the questions we did a job analysis, yes.

Q Where is the job analysis in documentary form?

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A There is none.

Q When you prepared the examination, did you work from a job analysis? Did you refer to a job analysis?

A You mean a specific group of pieces of paper labeled such?

THE COURT: What is your definition of the job analysis that you did?

THE WITNESS: The things that we did in learning about the job and the necessary knowledges, skills and abilities related to the job.

THE COURT: Are you saying in effect that the consultants who already were in the department, as I understand it, in the Department of Correction, had a certain body of knowledge as to what the job contained and that you and your colleagues in Civil Service made visits, and so on, and you acquired a certain amount of information and that was the job analysis?

THE WITNESS: That's correct.

Q In your deposition on page 36, I would like to read you a portion.

"Q Do the K, S and A statements constitute a job analysis?

"A There is a portion of the job analysis which includes the class specifications for the position. They

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are the end product of that whole process which involved in some cases particular job audits, the job specifications in general as a product of that and combined with the determination of, let's say, the scope and the drawing up of K, S and A statements. That whole process is in effect a job analysis. It is not by itself a job analysis."

Did you mean at the time that the products of the job analysis which you have defines as a process were specifications, K, S and A statements, job audits and the scope statement?

A I think that would be accurate. Of course, there is one point in here, and that is that a job analysis which is supposed to describe the job itself may not be related on a one-to-one basis with, let's say, the K, S and A statements drawn on a test with the aspects of those portions you wish to measure.

Do you follow?

In other words, a job analysis that completely describes a job under all circumstances, all right, and the corresponding knowledges, skills and abilities relating to all possible positions may not be completely reflected in those K, S and A statements that you are using in relationship to the examination.

Q But in the drawing up of a K, S and A statement

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you would have the complete description to draw from?

A In general, but, as I say, not necessarily in a documentary form. As you go along in the process, you are determining in some way K, S and A's for the job; and based on importance and relevance in testing situations, for instance, you select from that, and those are the ones that end up on the examination.

Q Where in these various documents is there reference to the need for correction sergeants to answer the questions of inmates about rules and regulations?

A In which documents? In the specifications?

Q In any of the documents you mentioned, the specifications, K, S and A statements, job audits, scope statement.

A I am not sure that I can pinpoint a place. I know that in your visits, for instance, we saw several instances where correction officers of inmates were talking with sergeants, a discussion of problems of one sort or another. I had seen things along those lines.

Again, I can't pinpoint a specific place in there where it talks about that, although it does seem to me on the class specification with regard to correction officer that there is a comment about day-to-day counseling of inmates, and I would consider that in some way at least to be

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related to the idea of answering questions of one sort or another that are brought to either an officer's or sergeant's attention.

THE COURT: Mr. Siegal, one question. I may be muddying up already muddied waters. I would like to ask this. Many people are concerned with the subject of testing in all the different applications academically and otherwise as to the disadvantage which the very process of testing places on people who are not good on doing tests as compared with others who are good or better at doing tests.

Does Civil Service take that kind of factor into consideration at all in determining the construction of its own examination?

THE WITNESS: Definitely.

THE COURT: How do you accomodate it in an examination like 34944?

THE WITNESS: Well, for instance, in the preparation material there had been some sort of initial analysis on relationship of scores of, let's say, blacks and whites on that kind of material. The material that I am more familiar with, for instance, in the situational judgment items, we had gotten an ethnic item analysis with the generation of the examination of 1972, and we noticed some patterns in terms of the times of questions that were related to the job but

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also produced extremely small if not non-existent differences between blacks and whites. And we attempted to use as much of this type of material as possible in the construction of this examination. This is in terms of the general, let's say, format of the questions, the type of situation that is involved, and so on.

Those are things that come readily to mind, at least. But there is no question that we are attempting to prepare tests that do not have differential ethnic impact. Certainly --

THE COURT: You are going even beyond my particular application of this question of having a problem taking a test, but you are meeting the issue head on with relation to what is alleged in this case.

THE WITNESS: That is correct.

Q Mr. Siegal, is the job of correction sergeant related closely to the job of correction officer?

A There is certainly a strong relationship between the two.

Q What is the nature of the relation?

A Of course, there is the direct relationship between -- to the extent that sergeants to a large extent supervise the correction officers in the performance of their jobs.

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In addition, there is the question of training and evaluation of people in this position in order for them to supervise a given area, let's say, in the facility, a certain post. They have to have a knowledge of all the duties that the correction officer must perform in that area. Certainly, as a first line supervisor, they must be able to direct the officer in the performance of his duties. They should know the methods and procedures that an officer might use, they should know what are in some way at least standards of performance, and so on.

Q Would it be correct to say that if the job of a correction officer changes significantly the job of a sergeant changes significantly?

A I would think so.

Q As indicated in Plaintiffs' Exhibit 3, which is a discussion of a change in class specifications, the class specifications being Plaintiffs' Exhibits 43 and --

THE COURT: Are you going to give me something?

MRS. GREENBERG: This is Plaintiffs' Exhibit 3. The pages are not numbered sequentially. After page 24, the pages start again headed 19, 20 and 21. Page 3 of that section.

THE COURT: You mean the third page of that section?

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MRS. GREENBERG: Yes.

THE COURT: After page 24?

MRS. GREENBERG: Yes.

THE COURT: Where it says class specifications at the bottom of the page?

MRS. GREENBERG: Yes.

Q The last paragraph:

"The revisions made in 1971 were as follows: Reallocation of correction officer to grade 13 and addition of the duties: takes active part in day-to-day counseling for rehabilitation."

The next page --

THE COURT: That is talking about a correction officer, is that right?

MRS. GREENBERG: Yes.

Q The next page:

"The revisions made in 1972 were as follows: Addition of duties to correction officer 'evaluates the performance and attitude of inmates supervised.'"

That is all that is relevant here.

Were you aware of those changes in the correction officer specifications in 1971 or 1972 when you drafted the 1972 sergeant's examination?

A Well, as I say, I may not have been aware of them

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as being changes. I was aware of the specifications for the job at that point.

Q How would these changes in a correction officer's job bear on the sergeant's job?

A Certainly if the officer has differing duties, the sergeant must be aware of those and must be aware in some way of the things that the officer should be doing in order to perform those.

Q Let's be specific. The 1971 change in the correction officer's specification added to the correction officer's duties: "Takes active part in day-to-day counseling for rehabilitation."

Now, how would that change or addition in the correction officer's duties change the sergeant's duties?

A The idea that the correction officer position, let's say if we look at the employee rule book, the methods of discipline, the approach that the officer is supposed to take with regard to inmates, his degree of contact, say familiarity, with inmates, and so on, has been changed, and this is one aspect of this getting involved in day-to-day counseling.

Aside from strictly group counseling sections or something like that, it involves the setting up of closer relationships, into personal relationships than otherwise,

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between officers and inmates. Certainly some of the people in the field who have been working for a long period of time are still operating or had been operating under an older philosophy about contacts with inmates and your approach to them. The position of the sergeant as supervisor would be to motivate the individuals to follow along with this new generalized procedure, let's say, and to explain to them the best methods for doing something like this and if there were problems of one sort or another helping them with them. Those would be some instances.

THE COURT: It is like a corporate officer being required to see his subordinates carry out a new policy of the company?

THE WITNESS: Something to that effect.

Q The change in 1972 was there was added to the correction officer's duties: "Evaluates the performance and attitudes of inmates supervised."

How would that addition affect the sergeant's job?

A The officers, in response to this type of procedure and setting up of, for instance, the adjustment committee or the intensification of the service unit, would now allow for additional input from correction officers themselves in terms of written reports or statements, or so on. The

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correction sergeant as an observed in the same areas would be involved in both observing inmates themselves and preparing similar types of reports plus reviewing to some extent, at least, those reports made by correction officers.

Q Would any correction sergeant have to teach a correction officer how to evaluate the performance and attitudes of inmates supervised?

A I don't know if we can say "teach." He would certainly in some way try to help the officer to be able to do these things.

Q You testified this morning that the sergeant received a salary grade increase.

A That the sergeant --

Q Was it the sergeant's grade which was increased or just the correction officer?

A I missed the date on that. In the past several years, the correction officer position has been upgraded one, two or three times. In addition, at some point along the way the sergeant was also upgraded in terms of salary grade.

Q Yes, and you stated that that salary grade increase was not necessarily related to the level of supervision but was based on an increased amount of counseling and rehabilitation done by correction officers and sergeants?

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A Yes. In addition, it relates to other things, too, such as the degree of risk involved in the job, and so on. There are certain political or practical considerations that are made in determining salary grades for employees.

Q I would like to show you once again Plaintiffs' Exhibit 18. Other than questions 25 and 26, which seem as though they could possibly relate -- well, do those questions relate to rehabilitation and counseling?

A To some extent, yes.

Q Are there any other questions in Plaintiffs' Exhibit 18 that relate to rehabilitation and counseling?

A Well, I think --

Q Counseling for rehabilitation. That is the term.

MRS. GORDON: Could we include in that Plaintiffs' Exhibit 19, too?

MRS. GREENBERG: I will --

MRS. GORDON: Oh.

Q Is that part of 34944?

MRS. GORDON: There are two pieces of the test. Counsel has separated them.

MRS. GREENBERG: This is Plaintiffs' Exhibit 18 we are discussing now.

A Well, I think that, for instance, question 19 relates to the relationship between an officer and a new

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inmate which would, of course, relate to his ability to deal with him on a certain level. 19.

THE COURT: Can we go on to any others?

THE WITNESS: 20 is a generalized statement in terms of morale, which, of course, relates to your ability to counsel or to affect the attitudes and behaviors of those people that you are supervising, as a for instance. 22 relates to the idea of the amount of time that is spent in relationship of the correction officer to the inmates and the type of contact or the type of influence that he can have on the attitudes of the inmate.

THE COURT: What is the correct answer to 22, do you know?

THE WITNESS: The correct answer is B.

Again 28 in some general sort of way, I would think.

Q How does question 28 measure a sergeant's ability to deal with inmates or with correction officers with respect to rehabilitation?

A If you are counseling an individual, you have to have an idea as to the goal that you have in mind. Otherwise if your goal and counseling is to keep the fellow quiet and not cause any trouble and -- you know, that type of thing -- certainly the approach you would use, the method you would use, the things you would say to him would be completely

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than if you intended to have this individual come out of the facility at the end as a responsible human being, and I think certainly the end result of your counseling and day-to-day relationship with people has to affect the way you approach them.

THE COURT: Without meaning to comment on your answer in any way, what is the correct answer t number 28, if you know?

THE WITNESS: C.

THE COURT: The reason I ask the question, of course, is that this is a question which judges throughout the country if not throughout the world are arguing about all over the lot at the moment and I suppose that many of them might agree C is the right answer but I don't think you would find unanimous opinion on what is the right answer to that question.

MRS. GREENBERG: It might depend on the offender.

THE COURT: It should.

MRS. GORDON: Also, your Honor, I just call to the court's attention I believe the names of the facilities were changed to correctional facilities as opposed to prisons to somewhat reflect the department's view.

Q Are you finished?

A With that particular section. I assume you are

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referring to 16 through 30. Is that correct?

Q Are there in any of the other sections questions relating to counseling or to helping a correction officer to evaluate an inmate's performance?

A Well 35 in a general way could relate to a particular problem with supervision of an officer in terms of day-to-day counseling.

THE COURT: Mr. Siegal, you are looking imploringly at Mrs. Greenberg. I don't know whether she is persuaded. The question is what your information is. I heard you. If she wants to ask you about that, she can ask you. I will make this suggestion. Look this over and see if there are any others.

MRS. GREENBERG: I would like Mr. Siegal to look at Plaintiffs' Exhibit 19 also.

THE COURT: Are we ever going to let Mr. Siegal off the stand?

MRS. GREENBERG: I have a bit more.

(Recess.)

BY MRS. GREENBERG:

Q Mr. Siegal, who made the decision that the K, S and A's for the position of correction sergeant could best be measured by a written exam?

MRS. GORDON: Excuse me, your Honor. There is a

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constitutional -- I withdraw it.

A It was determined by the Department of Civil Service and the Department of Correctional Services.

THE COURT: Are you asking for certain people, Mrs. Greenberg, or are you satisfied to bring out which departments?

MRS. GREENBERG: I would like to read to Mr. Siegal from his deposition.

Q Page 14.

"Q Who made the decision that the K, S and A's for the position of correction officer could best be measured by a written examination?"

I think the context of the answer indicates that what was both meant and understood was correction sergeant.

"A I don't know. At -- it's to a large extent, I suppose, a decision of history, let's say, where previously selections for this position have been made by written examination and I would assume that the request that we received from the Department of Correctional Services for this examination also indicated request for a written examination. But as to the individual or individuals specifically responsible, I don't know."

THE COURT: Is that your present testimony?

THE WITNESS: Yes.

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MRS. GREENBERG: I would like to read from a portion of Defendants' Exhibit J, which a Civil Service training course text. Mr. Siegal testified before he took this course or a similar course. It is page 3 of the examination planning chapter, which is the first chapter.

THE COURT: Is this some of the written material from the course? Is that what you mean?

MRS. GREENBERG: Yes.

THE COURT: Are you going to ask a question on the basis of it?

MRS. GREENBERG: Yes.

Q "Written test. This is a basic element in any civil service selection program because it is the most widely adaptable and most economical means of selection. A determination to use a written test, however, should be based on a conscious decision that the K, S and A required on the job can best be measured by a written test."

Did you make a conscious decision that the K, S and A required for the job of correction sergeant could best be measured by a written test?

A Yes, I made -- at the scope conference, for instance, I had in my own mind those things that I thought we would be testing for. Certainly then were changed and modified to some extent by the things that we found out and talked over with the consultants. If I had felt

at that time that a written test was not appropriate, I certainly would have attempted to change it for some other format or I could have done basically the same thing during the process of preparing items.

Q Do you think there is an inconsistency with your answer on deposition when I asked who made the decision and you said, "I don't know. It is to a large extent a decision of history"?

A I suppose you can view it in that way. I will make this comment, that is, that at any given point in time when a question is posed to me I will answer as I can at that point. My mind is not always in the same place at different times.

Q I would like to read you from another portion of the same page of examination planning, page 3.

"Training and experience rating. This method of evaluation is sometimes applied in instances in which the quality and extent of a candidate's previous training and experience is judged an adequate indicator of his potential for effectiveness on a particular job. Training and experience rating scales must be carefully devised so that scores do not simply correlate with age. The critical decision, however, is that training and experience scores are as good a job performance predictor or better than

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any other measurement device that we might apply."

Did you make the decision that training and experience scores, the conscious decision, that training and experience scores would not be as good or better a job performance predictor than the written examination?

A Yes, I did.

Q Who determined the number of questions on each sub test?

A I think --

Q I know you answered that this morning but I can't remember precisely.

A As I say, in our department we work on the basis of 15 questions per sub test and we work in constructing a test in sub test units.

Q Has a sergeant's job changed significantly in the past ten years?

A I would certainly think so.

Q Isn't it true that the scope of the sergeant's examination as set forth in Plaintiffs' Exhibit 43 has not changed in any significant respect since 1964?

THE COURT: Have you got something in '64 to compare to?

MRS. GREENBERG: Yes.

MR. BALIER: I did leave a copy of that on the

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bench.

THE COURT: I have 43. What is it you left?

MR. BALLER: A copy of that.

THE COURT: Are both of them here? I see. Very good.

A The scope statements are in general the same in '64 and '72.

Q Isn't it true that the job specification for correction sergeant since 1962 -- pardon me -- that the job specification for sergeant in 1972 is verbatim identical to the job specification for sergeant in 1962 except that the term "correctional facility" has been substituted for the term "prison" or "reformatory"?

MRS. GORDON: Your Honor, I except to that. First of all, the witness hasn't said he read or referred to in any way the statements from '62.

Further, it's quite clear from what counsel elaborated before that there were changes in the class specification.

MRS. GREENBERG: The class specification for correction sergeant.

THE COURT: This can be very simply established without bothering Mr. Siegal by putting before me whatever you have.

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MRS. GREENBERG: I will withdraw the question and let the record speak for itself.

Q Mr. Siegal, are there certain personality traits or characteristics the possession of which would add to the quality of a person's performance as a correction sergeant but which were not tested for on examination 34944?

A I believe that there are certain so-called personality aspects and behavioral aspects which might relate to the performance of the job of correction sergeant.

THE COURT: And which were not tested?

THE WITNESS: Correct.

Q I asked you that identical question on page 52 of your deposition. I would like to read your answer which, after a bit of colloquy, is on the bottom of page 53.

"I believe again in my opinion that ability to treat people as individuals, to treat them fairly under all circumstances or close to it, that they can relate to people of differing backgrounds whether they be cultural, social, ethnic, what have you, things in general of that sort. As I said, being able to treat an individual, an inmate, let's say, as a person, as a man, are things that I specifically think of in terms of correction." Again, they are only my own opinion and I have nothing to substantiate that belief."

THE COURT: I am not quite sure why you read that.

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Q Do you still agree with that statement?

A I think as a question of personality traits, along those lines, yes.

MRS. GORDON: Your Honor, I want to note at this point counsel appears to be using the deposition quite properly to try to show prior inconsistent statements. I would just like the court to note certainly I don't agree that these are inconsistent statements. However, if it would facilitate the court in any way, we would be perfectly happy to have this deposition marked in evidence and placed before the court.

MRS. GREENBERG: I was trying to spare the court.

THE COURT: If it is just one or two isolated questions, I would rather have them put in the record. Thank you for your offer.

I may say I don't find the last statement to be particularly inconsistent with what Mr. Siegal has testified to.

MRS. GORDON: I understand that, your Honor, but I thought since it has been used so many times now perhaps it might be well to have it in context before the court and then we might also be able to refer to it.

THE COURT: If anybody wants to put the deposition in evidence, they are free to do it.

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MRS. GORDON: Thank you.

MRS. GREENBERG: I did not intend to show it as an inconsistency but as an elaboration on his part.

Q You testified that the scope of the 1972 examination changed to substitute a sub test on the preparation of written reports for one on reading comprehension. Why was that substitution made?

A Well, in the discussions that were held at the scope conference relating to the position, and so on, it was felt that the report preparation material would be more closely related to the duties performed by a sergeant.

Q I would say, in referring back to some notes that I have since located, it appears to me that I and my supervisor had discussed something along these lines prior to attending the scope conference. I point out again that this type again was used on the police examinations, which he was in part responsible for and we felt it would be useful in this context.

Q To that extent that you made that substitution, was the 1972 examination for correction sergeant more job related than the 1970 sergeant's examination?

A Based on merely the substitution of that element of the scope, I couldn't answer the question. Again, I was not that familiar with the job or the examination in

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1970 as it related to one another. I don't know how to make that kind of judgment.

Q I understood you to say that you felt that the preparation of written reports was more closely related to the job of correction sergeant than reading comprehension.

A In 1972, when we were preparing the exam.

MRS. GREENBERG: I would like to point out to the court that on page 2 of Plaintiffs' Exhibit 43 in the 1964 sergeant's exam there is a 15 item sub test: Ability to prepare written reports.

Q Was the process of developing the 1972 sergeant's examination similar to that used for constructing prior sergeant's examinations?

A I really can't say since I was not there at the time. I was not involved in the process.

Q I would like to show you now Defendants' Exhibit DD --

MRS. GREENBERG: Do you have a copy?

THE COURT: No, because I gave mine back to Mrs. Gordon.

MRS. GORDON: Here it is, your Honor.

THE COURT: Actually I gave the exhibit back to you. Thank you. I have it now.

Q I want you to look at the bottom section which on

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the right is entitled "Totals."

Would you please tell the court what the figures under W/B signifcance in the bottom section of that exhibit means?

A This one?

Q Yes. The figures .001, etc.

A That means that there is a statistically significant difference between the mean total test scores and sub test scores for blacks versus whites, taking them as a total group.

THE COURT: For the mean?

Q Don't they mean that -- what does that mean in lay terms?

A That they are different.

Q Doesn't that mean that the chance is one in a thousand that you had a non-representative sample?

A No, I think there is a one in a thousand chance that these differences could have existed or could exist if the two groups were drawn -- if the two samples were drawn from the same population.

Q Doesn't that mean, in other terms, that the chance is one in a thousand that the disparity in performance was related to other than the fact that the takers were black or white?

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A No, it doesn't. It doesn't indicate --

THE COURT: As I understand what it means, it is that the chances are one in a thousand that this would occur with either groups -- between groups randomly chosen or between two similar groups.

Is the latter incorrect?

THE WITNESS: In effect. If you said all these people are the same and you draw two groups and you got these results, this kind of difference would occur only one time out of a thousand.

Q Since you divided the takers into three groups -- white, black and Hispanic -- wouldn't these figures mean that the chance is less than one in a thousand that the disparity between blacks and whites has something to do with other than their race?

A No, no. There are other things. For instance, as we can see here, some of the things might be attributable to the effect of the facility in which they work. Some of them might be attributable to other things. I don't know what those things are but they might include such things as education, other types of training and experience, seniority, and so on.

THE COURT: This figure doesn't purport to tell you why it exists but the probability of its existing, isn't

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that correct?

THE WITNESS: That's correct.

Q Doesn't it indicate the probability of its existing for a reason having something to do with their being black or white?

A It does not show a cause-effect relationship. It is an indication that a difference exists. Now, it might be possible --

Q That a difference exists between blacks and whites?

THE COURT: No, that a difference existed between blacks and whites in the results of this examination.

A Between these two samples. It might be possible, for instance, as we saw in just looking at the white scores, the passing rates for whites, that there were differences among those groups based on the facility in which they worked.

Now, if you are going to compare two groups such as, for instance, blacks versus whites and you want to take into account the other variables that are involved, there are various statistical procedures, like analysis of variances, something along those lines, that could more directly relate to a cause-effect relationship. This does not, and this does not take into consideration other things that are involved like other differences in the group other

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than merely their ethnicity.

Q But since the only groups you divided them into were black and white, then you would have to attribute the differences to their being black or white?

A No, I would not.

THE COURT: I don't agree either, Mrs. Greenberg. I can well see the possibility of an examination in which all the blacks were graduated from an excellent college and all the whites were grade school graduates and the blacks did much better on this examination than the whites.

Q In the righthand column, W/PR significance, on the bottom totals, on the figure opposite "Law" there is an NS. What does that mean?

A Not significant. The difference was not significant for these samples.

Q Does that mean that the difference is just random or does it mean that the chance is more than, say, five in one hundred that the disparity is by chance?

A I think, as I mentioned, that when I say not significant I mean that the probability is ~~equal to or~~ more less than five times out of a hundred being due to chance. Now, certainly it is clear that you can look at the average score for Hispanics on this sub test and the average score for whites and they certainly are different. But in terms of

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doing a statistical comparison between the two we use a variety of computations and what have you.

Q Now, in terms of the impact of the disparity of scores on black and Hispanic, isn't the only figure that means anything the score received on the test as a whole?

THE COURT: Would you read the question back?

(Question read.)

THE COURT: By "impact" do you mean the impact in terms of the possibility of advancement, of being promoted?

MRS. GREENBERG: Yes.

THE COURT: Isn't that sort of self evident?

THE WITNESS: I would think so.

MRS. GREENBERG: I wondered why there was all this data about sub tests.

THE WITNESS: As I said yesterday or some time, in order for us to examine what is happening where differences are occurring for ourselves in terms of what we can do in the future, we have to look at the sub tests. We have to look at items. Otherwise we are working in the dark.

MRS. GREENBERG: I would like to bring to the court's attention Plaintiffs' Exhibit 33.

THE COURT: Yes.

MRS. GREENBERG: Which indicates for examination 34944 the numbers of whites, blacks and Hispanics who took

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the test at all facilities, at Ossining and at Greenhaven, the numbers who passed, failed and the percentages.

THE COURT: Yes. I wasn't aware it was Exhibit 33, and I am glad to have my attention called to that. I think the statistics themselves have been called to my attention at least in gross earlier.

MRS. GREENBERG: Inasmuch as Defendants' Exhibit DD breaks down both total Ossining and Greenhaven, I thought it would be useful for the court to be able to see Plaintiffs' Exhibit 33.

THE COURT: Very good.

Mr. Siegal, have you any personal opinion as to why such statistically significant differences have occurred among the groups in taking the examination?

THE WITNESS: Well, I am certainly not going to say I know the reason for sure. I had ordered some other data on this examination relating to, for instance, age and seniority in terms of its relationship to test scores, and this is for my own edification as we delve into this process.

It did appear to me, for instance, there were effects due to length of service, to some extent. This we would have to study.

THE COURT: Did they do better or worse the longer they were there?

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THE WITNESS: There are two things to take into consideration. It is the time of the thing. Within a period of, let's say, the first five years on the job, generally speaking, let's say, the scores are not quite as high or the passing rate is not quite as high. Around five years it's reasonably high. Beyond that point it gets, in general, a little bit lower. Of course, the fact to remember with this is that those people who have been on the job, let's say, more than five years have had previous opportunities to take the sergeant's examination. As a result, we would expect those better qualified individuals have already been selected out from that position. Therefore, the people who are presently correction officers who have been working in that position for twenty years are the people who missed out several times along the way.

THE COURT: I won't push farther on that.

Q Mr. Siegal, did you do an item reliability index for examination 34944?

A I did. We calculated item reliability indices for the items in that test.

Q What were the results of that?

A Do you want the actual numbers for each one? The item reliability index is an index as to how the item is working in relationship to the sub test, how it is spreading

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out the candidates on a given item.

THE COURT: So there is a different index for each item?

THE WITNESS: That is correct.

THE COURT: So you can't tell how they did in one sentence?

THE WITNESS: It is within the context of the sub test.

THE COURT: You would have to go over each item to make a complete answer?

THE WITNESS: Right, and I would have to-get the figures. I don't have them with me.

Q Do you know the reliability of the whole test?

A In what respect? What value, number, are you looking for? I don't know.

Q Do you know if there is a standard way in which the reliability of a test is measured in numbers?

A I know of several which I mentioned before. I don't know if you mean a test-retest, split halfs, Spearman-Brown, internal consistency. I am not sure which one you are interested in.

Q Can you give me the figures for each of those?

A We have calculated numbers which relate to, say, Spearman-Brown, in effect, or split half which is in the

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neighborhood of .75 for the total group, if I recall correctly, something in that general neighborhood. Of course, to enable you to use, let's say, Spearman-Brown there are several assumptions that are made, and that is that the test can be divided into two parallel halfs. Now, obviously when you have 75 items you can't split them exactly in half.

In addition, the sub tests are made up of items that measure a variety of different K, S and A's. Because of that it is difficult, if not impossible, to construct parallel forms from a given test. So we would expect, therefore, that the reliability coefficient of Spearman-Brown, for instance, to be let's say an underestimate or lower bound on the reliability coefficient for the test as a whole.

THE COURT: You say you expect the coefficient to be low?

THE WITNESS: This would be a lower bound on it in the sense that in order to strictly use that formula you must be able to construct parallel forms.

THE COURT: I understand that. What does .75 mean?

THE WITNESS: Let's say the highest one you could get would be one. .75 I suppose, depending on who you talk to, would be considered fairly reasonable, let's say, for

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the test as a whole. Because of the fact we don't meet certain assumptions in using that formula, we would expect it to be a lower bound.

BY MRS. GREENBERG:

Q I would like to come back to the exam and the line of questions that we were asking before the break.

Did you find any additional items which you felt dealt with the new duties of sergeant, that is, the duties of counseling for rehabilitation and helping correction officers with evaluation of inmates?

A Well, I think that question 8 in booklet 486-E.

THE COURT: 8 in what?

MRS. GORDON: 19, your Honor.

MRS. GREENBERG: Plaintiffs' Exhibit 19.

THE COURT: We are on 19 now?

MRS. GREENBERG: Yes.

THE COURT: All right. Have we finished with 18?

THE WITNESS: Question 14 also in relation to a supervisor.--

THE COURT: 8 in 19?

THE WITNESS: That's correct.

Q Is that it?

A Those are the nnly ones I was able to find.

Q This morning you testified that in the case of

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two questions you had multiple keys, in one case because there was an item defect, the first portion or stem of the item had a missing part. I would like you to look at item number 7 -- this is in Plaintiffs' Exhibit 19. This is the transportation question.

Wasn't a part of that question missing, dealing with how much first aid the sergeant or the correction officer knew and whether they were in New York City or in the Adirondacks forest preserve?

A Well, in construction of items, certain things are clear. Number one is, especially in a situation, we are posing a situation, to completely explain the situation so that it is obvious to everyone that the exact nature of the circumstances, whether it be time, day of the week, length of service of the officer involved, the age of the inmate, the personality characteristics of the people involved, to accurately describe everything involved would be impossible. However, based on the analysis of the item statistics, the responses of those candidates in this field, it was clear that the people in the position understood what the question meant and for the most part were able to select the answer in this context.

Q Would you say, perhaps, that a person who could really think of all the possible alternatives would have a

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harder time giving the correct answer?

A I can think of situations where a so-called extremely testwise person or something like that --

THE COURT: Mrs. Greenberg means would lawyers have a harder time.

THE WITNESS: Some lawyers might. I don't know.

Q Do you think it would be a relevant consideration to answer that question whether you were in the Adirondacks forest preserve or in New York City?

A I think that might be relevant, yes.

THE COURT: I wish I were in the Adirondacks forest preserve.

Q Is it your opinion that a lay person can judge whether an examination is job related?

A A lay person meaning a person who has never worked in the field?

Q We will start with that.

THE COURT: In the field of what -- civil service?

THE WITNESS: Correction, I would assume.

Q A person who has never worked in the field of corrections.

A I think to some extent a person can if they have certain knowledges relating to the field. I don't think that the only people who can ever judge whether questions

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are job related are those people who have necessarily performed all those jobs.

Q Are you familiar with the term "face validity"?

A In a general way.

Q What does it mean to you?

A It means in some way that the questions or the test as a whole appears to the lay person to have some validity.

Q Is it an accepted form of validation?

A Not to my understanding.

Q Can you think of instances in which an examination or questions on an examination could have an appearance of relationship to a job yet not be related to the ability to perform that job?

A I personally can't recall any instance of that. I am sure that some exist somewhere.

Q Isn't that the reason, the fact that they do exist, that face validity is not an accepted means of validation?

A I really don't know the history of the term and how it's been used in the past.

Q Is it your opinion that a person who has never performed the job of correction sergeant and has no background in psychology or pschometrics could evaluate the job relatedness of a sergeant's examination?

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A I think I said that they can provide a certain amount of input based on other experiences they may have had.

Q You said this morning that the review process served as some measure of the job relatedness of the examination in that you could check how many protests you got about items and if you got a lot of protests about non-job relatedness of items, that could be a measure of the non-job relatedness of the examination and, conversely.

Did you testify to that effect?

A Something to that effect.

Q Do you feel that in your opinion someone who failed the correction sergeant's examination, someone who had never performed the job of correction sergeant, could determine whether a correction sergeant's examination was job related?

A Someone who failed and someone who never performed the job?

Q The same person, a correction officer who failed the examination.

A I think certainly individuals of that sort could provide information to an extent. Certainly they performed jobs in the performance of their duties and there are elements of a correction officer's job that are eminently related to the duties of a sergeant.

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THE COURT: In fact, you do get objections, don't you?

THE WITNESS: Yes, we have.

THE COURT: From people who haven't passed the examination?

THE WITNESS: Yes.

MRS. GREENBERG: I am trying to determine --

THE COURT: At least they come from people who don't know yet they have passed?

THE WITNESS: That is, from people who have taken the test.

MRS. GREENBERG: I am trying to determine the value of such objections on job relatedness.

THE COURT: I think I expressed some reservations this morning as to how much you can rely on that.

Q When you were testifying about personality tests, I believe you testified that the measures were not sufficiently reliable to be able to rank persons who received nine on a scale below a person who ranked ten on a scale. This was in connection with a question from Mrs. Gordon as to whether personality tests would be suitable in a civil service testing context where one had to produce a rank list.

Did you testify to that effect?

A Again, something to that effect.

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Q Are your measures in your correction sergeant's examination sufficiently reliable to be able to rank someone who scored 82.6 above someone who scored 82.5?

A There are certainly statistical pieces of information that relate to what they call the error of measurement which is inherent in any sort of selection device which indicates in some way the, say, fluctuations you would expect in scores over testing a period of time. No device ever used in selection, let's say, is going to give you 100 per cent accuracy every single time, and I think that would be true in this case as well.

Q One last question, Mr. Siegal.

If you had a free hand in developing any selection process you wanted for correction sergeant, what are some of the things you would do?

A Well, at this point in time, after what we have gone through, I think the first thing I would do is what I am going to do, which is to try to find a suitable criterion measure of job performance, because it's clear that numbers showing relationship of perhaps a test to the job are eminently useful in certain types of actions.

In addition, I would like to have information regarding the ability to rate correction sergeants and correction officers and related titles in terms of getting

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suitable measures as to how they do perform on a job. I am concerned. There is no question that I am concerned with methods of selecting people and I am always interested in selecting the better qualified people.

There is no question that there is a need for the selection of better qualified people in correction, and I certainly will make every effort to do that.

MRS. GREENBERG: Thank you for your patience. I have no more questions.

THE WITNESS: You are welcome.

THE COURT: Anything further, Mrs. Gordon?

MRS. GORDON: I am afraid so.

THE COURT: I don't know whether you are laughing with pleasure, grief, relief.

MRS. GORDON: Sort of everything, your Honor. I do have a few questions on redirect. I think maybe I will start. I will try to be very brief. I hope I will finish.

THE COURT: I must tell you, ladies and gentlemen, that I am sorry but I have four sentences tomorrow morning before we get started and I won't be able to start until a quarter of eleven tomorrow morning.

MRS. GORDON: I have one witness after Mr. Siegal who I had assumed we would get through today, obviously

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erroneously, viewing the scope of the cross examination.

THE COURT: And the direct examination.

MRS. GORDON: Now, Mr. Baller and I had talked and we had essentially agreed that I would come forward with my expert tomorrow and hopefully we would finish and then his expert would also I assume at least start and I think he even thought finish tomorrow. Obviously that doesn't look like it is going to be accomplished. I am perfectly free -- I mean I am glad to work into whatever schedule the court has, and that is fine, but I want you to be aware that we have another two witnesses after --

THE COURT: There are three more witnesses altogether, is that right, that are expected, one on your part plus an expert, plus an expert from the plaintiffs?

MRS. GORDON: Right. In total terms, your Honor, you indicated today that you would want to hear somebody from Albany or some actual person who had prepared that --

THE COURT: If you feel strongly about putting it in.

MRS. GORDON: I don't feel terribly strongly about it, your Honor, and I am frankly at this point willing to leave it at the stage it is, although I did give some thought about calling somebody down from Albany.

There is one other possible witness that I wanted

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to call with respect to some implications drawn by plaintiffs in terms of the way we keep our records and the identification of black people, and so on, apparently directed to the point of whether we could have done this kind of computerization of statistical data earlier. I have some information on that.

THE COURT: I am interested up to a point to hear all your mental processes, but it looks like, as I understand, that there will be only three more witnesses with the minor exception of getting a witness to authenticate, or whoever you want to call in support of the document you offered and which I rejected.

All I can say is that subject to starting a quarter of eleven tomorrow, which is Friday, I have Friday and Monday left and I will have to complete the testimony in those two days. You will have to judge your scope of examination accordingly.

MRS. GORDON: All right. I just don't want to leave misimpression. There was one additional witness I had thought I would call in terms --

THE COURT: You say you had thought. You mean you will call.

MRS. GORDON: I was planning to call but I don't consider it critical at this time.

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THE COURT: It is up to you to decide that. I can't decide it for you.

I will say to all of you that I feel now that I have received as much testimony as I have that I hope it will be possible to be more concise in questioning the next witnesses because it isn't necessary to establish a lot of propositions that I think were necessary to establish in the record up to now.

Mr. Siegal has made a great contribution in that regard.

REDIRECT EXAMINATION

BY MRS. GORDON:

Q Mr. Siegal, on a criterion validation model, can you validate an examination against a training course?

A. Well, it might be possible for you to have some sort of training ratings or criterion and relate training and scores in that line to examination.

However, it is fairly clear that this cannot be substituted for a measure of actual job performance and you can go one of two ways. You can either go back to the beginning and relate the test scores to job performance or you can try to use this training course relationship and then relate training scores to job performance.

Q In the criterion model framework, at what level or

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where in the work process do you feel that the critical factor is? Is it at the training course level or is it at the job performance level? And I am talking in terms of the criterion validation model.

A The criterion is job performance and it's clear that that is where it should be. I don't know if that answers your question. Training may play a part. For instance, you have -- many of those jobs or many jobs you have to have a training course to get on the job. The fact that the training course might in some way select out on the people who have already entered the program, it might be important, but if we are concerned with performance on the job, that's what the fellow gets paid for, then we have to use some measure of that actual performance.

Q Have you done any work on validating training courses as against examination and, if so, on what level?

A Well, in the fall of '72, this is about the time -- a short time after the promotion series was given, we were in the process of preparing a 1972 correction officer examination and as part of the process of selecting items for that we pretested the material on people in the correction officer training program and we did more or less a pilot study, in effect, to relate in some way some global training rating or score with the test score.

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In addition, we also looked at the ethnic background of those individuals taking the test and how their training scores related to test. Again, it's merely a pilot study and it was used in helping us to select individual items that we eventually did use in 1973.

Q What do you feel about the utility of such a study on the sergeant level?

A Well, again, we did not go after -- at that point we were again extremely rushed -- we did not use a job performance criterion. It was a very simple to a large extent unreliable global rating of this fellow during his training program. So there was no way to use this kind of thing for sergeants.

Q To your knowledge, are there any supervisory ratings now given to correction sergeants that can be used in a professionally developed criterion model?

A Well, the only straight supervisory rating that the defendant presently has, at least to my knowledge, is the yearly satisfactory-unsatisfactory work program rating form which is used to determine whether or not the fellow gets more money the following year.

It is also my understanding that the Department of Correctional Services is working on a program to develop a -- well, several things. One is sort of along the lines

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of standards of performance for the different positions as well as some sort of rating scale to be used on that. The process really hasn't started yet, but they are planning to work on it, in effect.

Q But as of this time is there such a rating system available for use in a criterion model as of today?

A Certainly not to my knowledge.

Q Counsel asked you quite a number of questions on job analysis and what documentation was available, and so on, in terms of developing the K, S and A's and selecting the items.

What I want to know, Mr. Siegal, is, in your terms, what did you think you had to know about the sergeant's job -- strike that.

In your terms, Mr. Siegal, what is a job analysis in the context in which you operate? What did you have to know and at what level or what depth do you think you had to know it in?

A Well, just in general terms, you want to know the knowledges, skills and abilities that are important to the job.

THE COURT: Can I intervene here because of the shortage of time? You have told us what you did. You told us you considered that to be a job analysis. Would it be

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fair for me to infer you thought that that was adequate?

THE WITNESS: I would think so.

THE COURT: We know what you did.

MRS. GORDON: Thank you, your Honor.

THE COURT: I assume you don't think it was inadequate.

MRS. GORDON: Your Honor, frankly, I think that is all at this time. If I have any further questions, it will be one or two in the morning.

THE COURT: Mr. Siegal doesn't have to stay overnight for one or two questions.

MRS. GORDON: I am afraid Mr. Siegal has to stay here for other reasons. Off the record, he is being called upon to defend the test, so he has a broader responsibility.

THE COURT: I thought you meant support his thesis on 34944.

We will adjourn until 10:45 in the morning. I urge counsel to see what they can do to make the examinations from here on in as concise as possible.

(Discussion off the record.)

(Adjourned to 10:45 A.M., July 27, 1973.)

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EDWARD L. KIRKLAND, etc.

Plaintiffs,

-against- 73 Civil 1548

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Defendants.

New York, New York
July 27, 1973
10:45 A.M.

(In open court.)

MR. BALLER: Your Honor, if I may take a moment to make a statement as to Defendants' Exhibit E, it will save us some testimony and complications later.

THE COURT: Defendants' Exhibit E?

MR. BALLER: Yes.

THE COURT: What is that?

MR. BALLER: The job audit.

MRS. GORDON: Could Mr. Baller and I approach the bench on that? I have the court's exhibit here.

THE COURT: I prefer you to keep the original.

MRS. GORDON: We have it in order and Mr. Baller has the same order.

MR. BALLER: There is one package out of order that you have.

(Discussion off the record.)

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MR. BALLER: This exhibit is the 1970 job audit. It consists of something in excess of 100 unnumbered pages stapled together into a number of separate pages. I have surveyed these pages for the purpose of determining how much of the exhibit deals with the duties, tasks or assignments of correction sergeants as opposed to correction officers, and I would like to state my view of what the evidence shows, obviously not as evidence but as a summary.

In the first package labeled occupational survey of correction officer, etc., there is no mention of a correction sergeant. I should state when I say there is no mention of a correction sergeant I am excluding items such as "Correction Sergeant Jones took us over to Post A where Correction Officer Smith was doing" and this is what Smith was doing. No mention of correction sergeant's duties in that packet.

In the second packet labeled Auburn, I found no mention of correction sergeant's duties.

In the third package labeled Elmira, I found mention sergeants' duties on the ninth and tenth unnumbered pages of that package beginning at the bottom of the ninth page and running onto the tenth page where there is a paragraph consisting of seven lines summarizing the correction sergeants' duties.

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On the twelfth through the fifteenth pages of that packet --

THE COURT: Elmira?

MR. BALLER: -- Elmira -- I am sorry -- on the twelfth and fifteenth pages of that packet starting a couple of pages later there is a paragraph beginning: "Outside Sergeant Fessenden" and then there is an approximately ten line paragraph describing what he does. I believe that's it on that one.

In the fourth package, which is a memorandum dated July 17, 1970, which I believe is a general memorandum summarizing the audit, if I am not mistaken from the context, I would like to direct the court's attention to the fourth page. It doesn't say anything about correction sergeants. It does say in the second paragraph:

"This information when combined with the findings of review of previous applications which were disapproved constitutes a record which shows a clear trend in the correction officer from a purely custodial role to one which makes significant demands on the officer to influence inmate behavior through advice and counsel."

I believe that previous testimony in this case shows that that was really what this entire audit was about. Later in that package, it's about six pages before the end,

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there is a page that's headed "Zone supervisor." It's numbered page 5 of the latter group of pages in the package, and that does contain a two-page description of what the zone supervisors, the sergeants -- I am sorry -- a three-page description of what the sergeants do as zone supervisors.

In the next package, a memorandum dated May 26, 1970, on the third page of that package there is in the first full paragraph a one-sentence description of what a sergeant does there.

On the eighth from the end page headed at the top "Draft," underlined, there is a full page description of what correction sergeants at Greenhave do.

And on the following page, which is also headed "Draft" it simply states that there are five correction sergeants in an area, and then it states what happens in the area.

I didn't find other references to correction -- I am sorry. The last two pages of that package also have some references to what a correction sergeant does.

In the following memorandum of June 1, 1970, to not listed from Mr. Soler, I found no mention of what a correction sergeant does.

In the following package, a memorandum dated

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July 7, 1970, again on the third and fourth pages of this, which I take it is some kind of a general summary of the audit, the discussion related exclusively to correction officer and related officer level jobs. I found no mention anywhere in the package of what a correction sergeant does.

In the next page labeled "Wallkill Prison," I found no mention of what a correction sergeant does.

In the last package labeled "Monterey Youth Camp," I found no direct mention of correction sergeant duties.

Thank you, your Honor.

THE COURT: Mrs. Gordon, do you want to make any comment as to the applicability of this material to the correction sergeant. I am not suggesting you are called on to do it. You have had a witness already who testificd.

MRS. GORDON: Right, your Honor. I would just like the record to note that we except tothe manner in which counsel has gone through these materials and certainly will elaborate them when we do our post-trial memorandum. As your Honor noted, there has already been a witness on the stand.

Just at this moment I would like to note a few page numbers for the record and obviously not limiting our references.

In the Auburn -- what we did, your Honor, was

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focus on references, specific references, to sergeant or CO's in institutions where sergeants supervised CO's and we just came up with this, again, as I say, brief page references which we will elaborate further and certainly we believe there are others.

In packet B, which is Auburn, we call the court's attention to pages 1 through 13 with reference to CO's and page 6 with reference to sergeants.

Now, I should note here, I think, the pages as we numbered them are essentially the same as the ones -- in the same order as Mr. Baller mentioned them, but we will check that.

With respect to packet C, whichis Elmira Reformatory, we call attention to CO's, pages 2 through 9, 11 through 16, 18 through 22 and that's with respect to CO specifically and with respect to sergeant pages 4, 9 through 10, 13 through 14.

THE COURT: Incidentally, I take it when you make these reference to CO's that you are implying that it's the position of the state that even material relating to CO's is relevant in describing a sergeant's job.

MRS. GORDON: Yes, your Honor, absolutely, on the theory the sergeant is the supervisor of the CO and that is how we see his function.

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In packet now called D, a memo of July 17, 1970, discussions and conclusions re reallocation, with respect to CO pages one through nine and with respect to sergeant pages 10 through 11.

Packet E, with reference to Greenhaven Prison, CO's pages 1 through 21, 23 through 30; sergeant pages 3, 11, 22 through 23, 30 through 31.

And packet F, which is the memorandum of June 1, 1970, pages 1 through 15 for CO and essentially sergeant, review of the basis for some of the conclusions reached as a result of the audit.

Packet G, Beacon, has no sergeants.

Coxsackie -- moving to Wallkill, which is H, pages 1 to 2, 7 to 17 for CO, and with respect to packet I, which is Monterey Youth Camp, that doesn't have sergeants.

Thank you, your Honor.

THE COUR T: Thank you very much. All right. I see Mr. Siegal is absent. Have you terminated his examination?

MRS. GORDON: Yes, your Honor. We are ready to call our next witness.

We call Hylan Sperbeck to the stand, please.

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GW

HYLAN SPERBECK, called as a witness by the defendants, being first duly sworn, testified as follows:

THE COURT: Will you keep your voice up so people can hear you in the back of the room.

MRS. GORDON: Try to talk to me and maybe that will help.

DIRECT EXAMINATION

BY MRS. GORDON:

Q What is your present position with the Department of Correctional -- excuse me. Would you please state your address for the record?

A Poughquag, New York.

Q And what is your present position and title?

A I am a captain stationed in Albany.

THE COURT: Is that in the Correction Department?

THE WITNESS: Yes.

Q Where are you presently assigned?

A To the training academy.

Q Is that part of the staff development unit?

A Yes.

Q And when did you become a captain?

A This past February.

Q What other titles and responsibilities have you

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had with the Department of Correctional Services? Perhaps it would be appropriate to start at the beginning and come down to the present day, but do it briefly.

A I started out as a correction officer in '57, was assigned to Greenhaven. 1960 I was transferred to a correction youth camp in Summit, New York. 1963 I returned to Greenhaven as a correction officer. 1968 I was appointed sergeant in Woodburne -- well, it was a narcotics facility at that time under NACC. '69 I transferred back to Greenhaven, worked in the narcotics unit there. About March of 1970 I was assigned, still as a sergeant, to head the training academy which was located in Beacon, New York.

I think it was January, '71, I was appointed a lieutenant. I am sorry. January of '72 I was appointed lieutenant. February of '73 I was appointed captain.

Q When did you first take on your responsibilities in relation to the academy?

THE COURT: In Albany?

MRS. GORDON: Your Honor --

THE COURT: He talked about Beacon before.

THE WITNESS: The academy has been moving around. It is the same institution but it has been moving around.

THE COURT: Then I think you told us. Anyway, say it again. When did you go with the academy?

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THE WITNESS: March, 1970.

Q From and after the time you have been at the academy, have you had any line responsibilities? I mean any field responsibilities.

A Yes. I was called in to Greenhaven when they had problems there. I worked there for a week one time. I was called in probably -- I would estimate five or six different weekends when they had unrest, if you will, with the inmate population. In 1971 I was called into Attica.

Q Was that during or shortly after the Attica riots which we have heard so much about?

A Yes.

Q I don't mean heard so much about hear but which we are aware of.

Did you participate in the development of examination 34944 for sergeant?

A Yes, I did.

Q Were there any other line officers participating with you?

A Yes. There was William Ciuros and David Harris.

Q Do you know what their titles were at the time they participated with you?

A Ciuros was a lieutenant, Mr. Harris was a captain.

Q And do you know how long they had been in the

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department, approximately?

A Approximately the same length of time that I have. Mr. Ciuros came in I believe in 1956; Mr. Harris, a rough estimate would be '59, '60.

Q By your statement that they were lieutenants at the time they were working with you --

THE COURT: One was a lieutenant and one was a captain.

A Mr. Harris was a captain.

Q By your statement that one was a lieutenant and one was a captain at the time that they were working with you or you were working with them, is it fair to assume that they were also sergeant at some point in their careers?

A They both have been.

Q When, approximately, did you start working on the examination?

A It was the end of July, 1972.

Q What was your understanding of your role in the examination?

A Well, Mr. Siegal called us in -- when I say "us" I mean Mr. Harris and Mr. Ciuros -- and explained they were responsible for setting up an examination series and advised us that they would like to have our expertise, if you will, in setting up certain questions in certain areas, drawing

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upon our knowledge, our experience, our background, trying to relate the questions around experiences that we had had or experiences, happenings, we knew about and were familiar with.

Q Did he ask you anything about what your opinion of the job of sergeant was?

A My opinion of the job of sergeant?

Q Did he ask you either individually or as a group to give him your idea of what kinds of things a sergeant did?

A Yes.

Q What areas of the examination, specifically, were you working on? When I say "you" I mean you and the other two.

A Laws, rules, regulations, modern concepts in correction and judgment.

Q Were there any specific areas of the examination you didn't work on?

A There were supervision and I don't know if they called it report writing.

THE COURT: You did not work on those?

THE WITNESS: Did not. Report writing or report preparation, something like that.

Q What did Mr. Siegal ask you to do, specifically, if anything?

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A Well, he explained to us in quite a bit of detail how you go about writing up questions.

Q How do you go about writing up a question?

A There is a stem or body of the question which is supposed to, if you will, tell a little story and pose a question, and then you have an answer and three of four distractors and they specifically wanted us to write these questions around our experiences or happenings which we knew about and then make up the answer, give the answer, and then make up these distractors but not have the distractor so far out that they were not necessarily related to the stem of the question. They didn't want them bulky, large questions; they wanted them, you know, concise. And the answer, they didn't want it so obvious and try not to use words in the stem and the answer. I am not making myself very clear.

THE COURT: The same words, you mean?

THE WITNESS: Try not to use the same words so it is a giveaway.

THE COURT: Try not to make the answer obvious?

THE WITNESS: Right.

Q After you got those instructions from Mr. Siegal, what actually did you do? Did you go home and write questions?

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A Yes.

Q Did Mr. Siegal write the questions? What happened?

A I went home and as you would get ideas you would jot them down on a piece of scrap paper, or something, and then try to sit down and pose the question around some of the experiences you had had, some of the laws, rules and regulations which were used every day or that you come in contact with, some of the things that you feel or that I felt, anyway, that a sergeant should know or at least be familiar with when he was supervising correction officers.

Then we would bring these back and there was a group of five or six -- six of us most usually , three from the Department of Correctional Services and three from Civil Service. They would go over the questions and virtually tear them apart, reword them and then say, "Now, does this still mean -- have the same meaning that you intended in the first place?"

And they would go over them for clarity, structure, and some of them they would say, "This isn't exactly what we are looking for" and would just lay it aside, it wouldn't be used.

Q Now, I take it from what you said you wrote some suggested questions down and did the other individuals do the same thing?

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A Yes.

Q By "the other individuals" I mean Harris and Ciuros.

A Yes.

Q And then in what context did you review these questions as you just indicated? Were there meetings? What happened?

A Well, like I said, the six of us would --

THE COURT: I understand, unless anybody else needs more detail, that the three consultants, after being told what Mr. Siegal expected of them, framed questions based on their own experience as to what they thought sergeants should know in order to do the job, brought them to a meeting with Mr. Siegal and his staff, went over them and corrected them and then Mr. Siegal took over.

Q Approximately how many meetings like that did you have, Captain, or did you attend, rather?

A I attended at least five. They ran anywhere from three to four to five hours.

Q At those meetings did you or the other officers review any questions that had been prepared by Mr. Siegal and his staff?

A I don't know -- well, Mr. Siegal presented them. I don't know if he prepared them or not. We did review

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questions that they asked us to review.

THE COURT: You reviewed questions not only that you and Mr. Harris, and so on, had made up but also questions that emanated from the Civil Service, is that right?

THE WITNESS: That's right.

Q Were any of the questions that you suggested or any of the suggestions you made in the course of this process, are any of them reflected on examination 34944?

A Yes.

Q By the way, approximately how many suggestions or suggested questions did you make in the course of this process? To Mr. Siegal, that is.

A Approximately thirty.

THE COURT: Yourself?

THE WITNESS: Yes.

THE COURT: Would you say that your companions, Captain Harris and Lieutenant Ciuros, submitted as many questions as you did?

THE WITNESS: No, they didn't. They submitted about fifteen each.

Let me explain that. They had a different assignment. I had more time to work on it than they did, too.

THE COURT: You want to protect yourself from criticizing them. I understand that.

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Q Just in terms of the questions you suggested, I asked you before whether or not any appeared on the examination which we have marked here as Plaintiffs' Exhibits 18 and 19. Now, can you pick out for us, and you don't have to go through all of them, Captain, a few of the questions that you think reflect the suggestions that you made or the questions that you suggested in the course of these meetings?

A Yes, I can.

Q You had better give us the exhibit number and the item number or the question number.

A By exhibit number you mean this handwritten number on the bottom?

Q Yes, that handwritten number.

A P.X. 19, question number four.

Q As I say, I don't want to go into detail. Are there any others that you see?

A Number seven.

Q Is that in 19?

A Yes. Number 8, 10, 11, 14, 15. That's about it on that section.

THE COURT: You batted very high on that test. Go on to Plaintiffs' Exhibit 18 now. There are a lot of questions on that, too.

THE WITNESS: Three, I think four but I am not

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sure, 11, I think 14, 19, 24.

Q Captain, I think we have enough --

A 27.

THE COURT: Thanks. There may be some in the latter part, too, but that is representative of your effort.

Q By the way, as you look at these questions now, are they in the same form as you originally suggested them?

A No, they are not. Question number four is a sample on P.X. 19. When I originally wrote it, it was with a lot less clarity. We tried to formulate this question and we spent the better part of an hour on it, and as a group no one could come up with an answer. So Mr. Harris took it home and he worked on it, brought it back, we worked on it again for probably half an hour or so, and then we let it go for a while and then at a later meeting Mr. Siegal had worked on it and we went over it again. So I would say on that particular question we probably spent collectively five or six hours either at home or in the office.

Q What was the problem with that question? What is this sergeant, who is second in command on the night shift, what is he supposed to be making a judgment based on?

A On the correctional law, a law in correction that says something to the effect that certain individuals may

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visit a facility at any time of day or night and go anywhere they want to and it names off these people.

THE COURT: A state legislator, as a matter of course?

THE WITNESS: Yes. It says assemblyman, senator, certain judges.

THE COURT: Assemblyman, senator, of course, up at the state legislature.

THE WITNESS: Right.

THE COURT: So the words "influential" and "critical" are just blind?

THE WITNESS: Well, when I originally wrote it --

THE COURT: The purpose of the question is to find out, then, is it, whether the candidate understood a state legislator had a right to come in the prison?

THE WITNESS: Yes --

THE COURT: I am not trying to trap you.

THE WITNESS: Yes.

Q What is the other problem that the sergeant has here besides the correction law, if he has any?

A He was given an order by a superior to not let any visitors in. Now, he actually has to go against his superior's order but he also has to understand that his superior cannot give him an illegal order, an order which

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goes against the law.

THE COURT: He also has to think about the fact his superior probably had no reason to believe any state legislator is goibg to show up at 5:30 in the afternoon and probably wasn't referring to that and that would be an element of judgment.

THE WITNESS: You have a problem going on. The lieutenant is not going to be that specific and draw the sergeant a picture. He expects him to --

THE COURT: Exercise discretion?

THE WITNESS: Right.

Q Did you review the portions of the examination that you had worked on prior to the time it was given?

A Yes. As a matter of fact, I think the day before the exam was given.

MRS. GORDON: Your Honor, I just call your attention to Plaintiffs' Exhibit 10, the third page, entry number two.

THE COURT: Which exhibit?

MRS. GORDON: Plaintiffs' Exhibit 10. I am just noting it for the record, your Honor. Plaintiffs' Exhibit 10, entry number two, third page of that exhibit.

THE COURT: Yes, I remember that. You are the famous Hy Sperbeck.

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THE WITNESS: Thank you.

Q Now, obviously that was pretty late in the course of events, but did you find any defect in the examination -- I am talking about the areas you worked on -- at the time you reviewed it?

A Yes.

Q That is just prior to the examination.

A There was one question that I brought to Mr. Siegal's attention that I didn't think was a good question and it was not worded then the way we had reviewed it.

Q Do you recall what question that was?

A Number 13.

THE COURT: On which --

THE WITNESS: P.X. 18.

THE COURT: Was it altered thereafter or is this the form it was in when you criticized it?

THE WITNESS: I went over there the day before the exam to take over some reference material that they wanted and they said, "Here are the parts of the exam you worked on. Do you want to review it?"

I looked at it. The exam had already been printed and it was to be given the next day. I read number 13 about five times and it just didn't make any sense to me, so I brought it to their attention.

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MRS. GORDON: Your Honor, I think if you refer to Plaintiffs' Exhibit 20 you will find that item 13 in P.X. 18 is one of those multiple keyed items.

Q Now, as captain in charge of the academy, what relationship do you have to training programs and that type of thing and to whom are they offered, if you know?

A I have general supervision over the training programs in all correction facilities which are under the direct supervision of a training lieutenant and general supervision over the pre-service or recruit training at the training academy.

Q The program that's given at the training academy, is that for correction officers?

A Yes.

Q And the program sponsored by the training lieutenants, who is that for?

A It's for all the correction employees in a facility--anyone in the facility can attend. A lot of it is designed specifically for the correction officers, correction sergeants and correction lieutenants.

Q Let's call, for convenience, the program that's conducted by the training lieutenant the in-service program and let's call the one for the correction officers at the academy the academy program.

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A All right.

Q How long was the in-service program? How long a course is the in-service program in the last year or so down to date?

A Last year it was a 52-hour program. In this current year it is 32 hours.

THE COURT: The in-service?

THE WITNESS: In-service, in the facilities.

Q Now, how about the training program at the academy?

A It's a three-month program.

Q Now, are there in either or both of these courses components which go to areas of human relations or understanding or attitudes as we might take those concepts in terms of training correction officers and higher level ranks? I show you Defendants' Exhibit --

THE COURT: You asked him a question. Let him answer it.

MRS. GORDON: I was going to show him an exhibit he could refer to if he wanted to.

A Yes. In the institutions or the facilities in the in-service training program this year, there is a 14-hour segment of 32 which is mandatory and it's on urban, suburban and rural cultures.

Q Why do you have a segment on urban -- why do you

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have that kind of segment?

A Well, it was felt when the program was designed that it was quite necessary because we get about in the neighborhood of 75 to 80 per cent of our clientele, if you will, the inmate population, from the city area. Not to demean your good city, but a good portion from New York City. And they are transferred to upstate facilities. I would estimate that approximately 75 per cent of our correction officer staff is from the rural background. So now you have your urban-suburban people being taken care of by rural people not necessarily understanding each other's background.

So we wanted to help the officers, if you will, understand more about the people that they are taking care of so that they can do a better job.

Q Does it have anything to do with the ethnic backgrounds of the clientele versus the officers?

A Yes.

Q Or supervisors?

A The way it is designed, they are supposed to cover the ethnic, social, economic, political aspects of rural, urban and suburban cultures.

THE COURT: It is quite a proposition.

THE WITNESS: It is. I am glad I am not teaching it.

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Q By the way, you mentioned that this in-service program was mandatory. To your knowledge, does everybody in the facility, who is supposed to go, go?

A No.

Q And how about the course content, does that vary at all from institution to institution?

A Well, let's put it that it is not supposed to. We call all the training lieutenants in, there are lesson plans made up and they are to follow these lesson plans.

However, if you call a sociologist or a psychologist into Attica who is out of Buffalo and you call the same type of individual into, say, Ossining who is out of a college down in this area, they are not going to say the same words, but the same basic philosophies are supposed to be covered.

THE COURT: I understand.

Q Now, are there similar components in the training academy course?

A Yes.

Q Just to illustrate, and I think we can be brief here, I show you Defendants' Exhibit D, which is the sequential training curriculum for March 12 of 1973 through June 5th of 1973, which I think we agreed earlier was illustrative.

Can you just show the court in terms of the course

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outline what you mean by either attitude or human relations components?

A One course in here is a two-hour block or course, attitudes in supervision. There is another two-day course taught by our minority recruitment man, Mr. Bush, formation of various attitudes and beliefs and relationships and attitudes among employees. We have one of our institutional psychiatrists, Dr. Hume, who comes in and teaches a course, abnormal inmate behavior. He covers specifically suicides, how to detect, prevent and handle suicide patients.

Group counseling is another subject which is given in an eight-hour segment; officer-inmate relations and attitudes, the development of groups by Mrs. Ealy.

THE COURT: The question I am about to ask you doesn't necessarily have to do with the subject matter of this case but, having heard an expert on this subject in which I am interested, it gives me an opportunity to ask it.

What kind of attitude do you find on the part of correction officers and their superiors with regard to taking courses of this kind? Is there a resistance? Does it vary substantially? Do a lot of people think it is just hogwash, or is the predominant view beginning to be that it's productive to learn this kind of material? Can you answer that?

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THE WITNESS: You have people on both ends.

THE COURT: Do you see any trend towards acceptance?

THE WITNESS: Yes, I think very definitely, yes.

THE COURT: Thank you.

Q By the way, in addition to this in-service course and the training course you mentioned, are there any other courses given by the department to ranking officers?

A Yes, we have an AMA supervisory management course.

Q To whom is that offered?

A Sergeants, lieutenants and captains at this time.

Q Are you in charge of that?

A No, I am not.

Q Now, at the training academy, do you rate in any way the candidates who take that training course?

A Yes.

Q In what kind of way do you rate them?

A Well, we give quizes, a midterm and a final exam try to rate them on their attitude, general demeanor, interest, the way they participate, the way they respond to their fellow officers, the way they respond to their supervisors.

Q Is the training academy course within the entry level officers' probationary term, as it's called?

A Yes.

Q Do you perform probationary evaluations?

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A Yes.

Q And approximately how many --

THE COURT: When you used the pronoun "you," are you referring to this officer in person?

MRS. GORDON: No.

Q As captain in command of the training academy, are probationary evaluations done with respect to the individuals in the training program? They would be officer candidates, I assume.

A Yes.

Q How often are they evaluated?

A If I remember correction, I think it's three times, once a month, approximately.

Q How long has this kind of regular evaluation been in effect for officers in the academy course?

A In direct relation to their probationary status, just since we started the three-month training program. Our first graduating class was in, I believe, June of '72. Then we have had eight classes so far.

Q With respect to the in-service program, are the individuals who take that program rated in any way?

A Attendance is taken.

Q Do you think the in-service program is amenable to being rated?

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A What do you mean specifically by "amenable"?

Q Could you give the sergeant who takes it a mark?

A No, you could not.

THE COURT: Why?

THE WITNESS: Most of the material is either lecture, group discussion, film, that type.

THE COURT: I don't know what Mrs. Gordon has in mind asking these questions, because it seems that wouldn't prevent you from giving a rating except you have to give an exam. Without any formal testing you could not rate him in a meaningful way?

THE WITNESS: No.

THE COURT: Is that what you mean?

THE WITNESS: Yes, that is what I mean.

Q Just so that we may be clear, could you just compare the training academy course to the 52 or 32-hour in-service course in terms of the structure of the organization of the course?

THE COURT: Mrs. Gordon, I find this very interesting but I would like for my own edification to understand what your belief is it has to do with the case.

MRS. GORDON: Because, your Honor, I think part of plaintiffs' case is that the defendants or at least the Civil Service Department are not properly getting at the

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testing of attitudes of inmates, their relationships, the human relation side of the [illegible] correction sergeant.

It is our position, [illegible], that the human relation side, to test that would probably require non-cognitive areas--

THE COURT: That we have gone through with Mr. Siegal.

MRS. GORDON: -- which we believe have not been validated for this type of purpose and, therefore, would not be appropriate for a selection device, so to speak.

However, I think it is relevant that the Corrections Department has considered attitudes, human relations aspects, and so forth, and takes action to try to instill such attitudes in their personnel.

THE COURT: I think it is fine, but I don't know whether it helps very much with regard to the question of whether that shows up in 34944.

MRS. GORDON: Your Honor, there are certain limitations, we believe, on examinations such as 34944.

THE COURT: If your argument is that this is impractical or unfeasible vis-a-vis 34944, and this trial is about 34944, what relevance is there as to the good works being done in the department in another fashion?

MRS. GORDON: Because I think it is plaintiffs' claim, or at least my understanding of plaintiffs' claim,

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that one of the reasons 34944 is not job related is because it is incomplete in some way.

THE COURT: Yes.

MRS. GORDON: We don't accept that and we believe that the completeness, the aspect that plaintiffs seem to argue make it incomplete are handled in other ways in the department and quite effectively.

THE COURT: I don't think that you can argue that. Legally I don't think that is a sound proposition. I don't see how you can impute into an examination for promotion at a certain place efforts made by the department in other ways in other subjects. I don't think that the plaintiffs would deny that there may be certain programs going on in the department which improve human relations throughout the system, but I assume their position would be that has nothing to do with this case.

Is that correct, Mr. Baller?

MR. BALLER: That is our position, your Honor.

MRS. GORDON: As you indicated yesterday, I think there is a legal point here which is not at least clear in the established case law. I don't think that plaintiffs can legally contend that an examination is not job related because it is incomplete in some particular aspect.

THE COURT: That is another matter, Mrs. Gordon.

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You don't solve that problem by telling me what you are doing elsewhere.

MRS. GORDON: Assuming your Honor accepted that type of premise as a legal premise, I would like at least to be able to show the court that the alleged incompleteness is in fact taken care of in some other types of ways.

THE COURT: I haven't made up my mind at all that I agree with the plaintiffs on their arguments as to incompleteness, but even if I did agree with the plaintiffs on the argument of incompleteness, I would not agree with the state that that incompleteness could be completed by something outside the examination.

MRS. GORDON: I understand.

THE COURT: I have gotten a good deal of enlightenment, anyway, as to what the state is doing in that regard now and I would like to move on to some other subject.

MRS. GORDON: I just wanted to note, and I won't continue the examination --

THE COURT: The earlier part of the captain's testimony was directly related, there is no question about that.

MRS. GORDON: I understand. I also would like to point out, your Honor, that perhaps in terms of the expert testimony we will hear within a criterion validation process

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model, the question of ratings is very significant because one usually establishes a criterion such as a grade on an examination in a training course and takes that criterion and matches it against test performance. That correlation indeed, if there is one, is what criterion validation is all about.

So the question may arise, as plaintiffs are obviously aware that we have these training courses, whether there exists a rating at the sergeant level that could be criterion validated as against test performance, all right, and I also wanted to establish that at least at this time there is no rating system applicable to sergeants for the in-service program. That was another aspect.

I have one concluding question which I think is directly germane to the case.

BY MRS. GORDON:

Q Captain Sperbeck, in talking about these courses, the in-service program and the academy program, in your opinion are they substitutes for the competitive examination process?

A Let me see if I understand you correctly. You are talking about the correction officer coming on the job, could the training program be a substitute for an examination?

Q Either the training program for the correction

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officer or the in-service program that the sergeant goes to, in your opinion.

A In no way. I will explain to you why.

When we get new correction officers in, they have gone through an examination which, if you will, we felt those who were not as acceptable as others were eliminated. If we had to just open the doors and take in a group of people who were five foot eight, at least, and weighed 155 pounds not not more than something else compared to whatever criteria they are using now from a physical point of view, you would have to test them to find out --

THE COURT: There is no use spending time on that. It is obvious the training program can't substitute for the examination. As long as you have an examination, a training program isn't going to be a substitute for the examination. One teaches and instructs, and the other questions. It is a totally different point.

MRS. GORDON: As long as the court is satisfied with that point, I have no further questions.

THE COURT: I understand that point.

MRS. GORDON: Can I direct the witness' attention to that question on the sergeant level?

THE COURT: I don't think it makes any difference what level it is at. I understand it.

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MRS. GORDON: O.K. Thank you. I am finished.

THE COURT: Mrs. Greenberg, any questions?

MRS. GREENBERG: Just a few.

CROSS EXAMINATION

BY MRS. GREENBERG:

Q Mr. Sperbeck, you stated that you have been at the training academy since March, 1970, is that correct?

A Yes.

Q You also stated that you have spent some weekends, five or six weekends, at Greenhaven and some time at Attica?

A Yes.

Q How much time did you spend at Attica?

A I think it was four days.

Q Four days at Attica?

A Right.

Q And five or six weekends at Greenhaven?

A Right.

Q Since you have been at the academy, have you spent any other time at those or any other institutions?

A Yes. I have hit this calendar year every institution in the state with the exception of Attica, Auburn --

Q I am sorry --

A -- and Elmira.

Q I am sorry to interrupt you. What I am interested

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in is time you spent at other institutions before September, 1972.

THE COURT: Before --

MRS. GREENBERG: He went to the training academy in March, '70.

THE COURT: What you are getting at is how much sergeant exposure he had, so to speak, before he went to work on the examination, is that right?

MRS. GREENBERG: Yes.

THE COURT: Do you understand?

THE WITNESS: Not really.

Q Could you tell me between March, 1970, and, say, the end of September, 1972, in addition to spending five or six weeks at Greenhaven --

A Five or six weekends.

Q -- at Greenhaven and four days at Attica, did you work at any other facilities?

THE COURT: Did you work in the field at all?

THE WITNESS: Not that much. I went into institutions on training programs but to actually work, no.

Q Did you understand when you were drafting the questions that you were drafting questions only for a sergeant's exam?

A No.

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Q For what exams were your questions drafted?

A There was a possibility that they would be used on the sergeants, lieutenants and a hospital series.

Q In fact, weren't the questions which you pointed out used on all those exams?

A I think -- no. Wait a minute. On the hospital series, I have no knowledge.

Q Sergeants and lieutenants?

A Sergeants and lieutenants, yes, or at least in part.

Q So you drafted questions bearing in mind what a lieutenant would have to know as well as what a sergeant would have to know?

A Yes.

THE COURT: The law I assume would be the same for a lieutenant as a sergeant?

THE WITNESS: Yes, the law would be the same, but in some cases the lieutenant has complete charge of a facility, so he would have to possibly be more familiar with the law than a sergeant would.

THE COURT: Are you saying that the questions would be at least as demanding as required by the sergeant's job and perhaps more demanding than required by the sergeant's job?

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THE WITNESS: I am sorry. I didn't understand you.

THE COURT: You were telling me that a lieutenant had greater responsibility than a sergeant.

THE WITNESS: Yes.

THE COURT: The implication I got, and I want to ask you if I am correct, is that you framed your questions in such a way that they would make sure not only that they tested what the sergeant had to know but they also tested what a lieutenant had to know.

THE WITNESS: Right.

THE COURT: Would a lieutenant in your opinion have to know more about the subject than the sergeant would have to know?

THE WITNESS: Yes.

Q I would like to read to you from Plaintiffs' Exhibit 18, question number 24, which is one of the ones that you drafted.

"Which one of the following is the primary function of a public relations program in a correctional department?

"A. improving the correction employee's working conditions

"B. promoting favorable publicity for the correctional department

"C. assisting the correctional department in

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accomplishing its goals and objectives

"D. creating a satisfactory image of the Correction Officer."

I will show it to you so you don't have to keep all that in your mind.

THE COURT: What number?

MRS. GREENBERG: Question 24, Plaintiffs' Exhibit 18.

Q Which is the correct answer?

A C.

Q The primary function of a public relations program is assisting the Correctional Department in accomplishing its goals and objectives?

A Yes.

Q Is that something a correction officer would know?

A That a correction officer would know?

Q Yes.

A I think he should know it or at least be familiar with it.

Q Is it something that a correction sergeant should know?

A Very definitely.

Q Why should a correction sergeant have to knowthat?

A Because he is dealing with the public on many

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occasions basically and I think his scope of knowledge about correction should not end just at the door of the facility. I think it should go beyond that.

Q How would a correction sergeant, someone who is going to take the correction sergeant's exam, learn that the primary function of the public relations program is to assist the department in accomplishing its goals and objectives? Do you think that is a matter of common sense?

A I think it's common sense plus there are books available that he can read, he can use the library. I see the Manual of Correctional Standards laying on the table. I don't know if it specifically states that, but it states that in there. We, as supervisors in the department, try to impart this knowledge to our people.

Q Do you think that as a general matter in organizations outside of the Correctional Department the purpose of a public relations program is to help the organization accomplish its goals rather than to promote favorable publicity for the organization?

A Would you say that again?

Q Yes. In organizations outside of the Corrections Department, just from your knowledge of the world in general, do you think that the function of a public relations program is to help the organization accomplish its goals and objectives

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rather than to promote favorable publicity for the organization? If you don't know, you don't have to answer.

A I am trying to think. Organizations. Are we talking about industry, are we talking about a narcotic organization? Help organizations where people help people? Are we trying to sell a product?

Q You think you would have to make those distinctions?

A I don't know. I really don't know.

MRS. GREENBERG: No more questions.

REDIRECT EXAMINATION

BY MRS. GORDON:

Q Captain Sperbeck, you indicated you were aware you were preparing questions for a lieutenant's exam possibly as well as a sergeant's exam.

Can you tell me in these meetings with Mr. Siegal were any distinctions made between material for the sergeant's exam and material for the lieutenant's exam?

A By "material" are you talking about the questions?

Q The questions you suggested or drafted.

A Yes.

Q Can you give us an example?

A If I had a copy of the lieutenant's exam I could probably point them out to you, but right now --

Q Let's put it this way. Were there questions and

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materials that you suggested or that your colleagues suggested that were used exclusively on the lieutenant's exam and not on the sergeant's exam?

A Yes. As I reviewed part of the exam which was for lieutenants only and not for sergeants, there were two questions that I specifically drafted and then later on polished, or whatever, which were on the lieutenant's exam which the sergeants did not have to take. Right at this moment, I can't remember what the two questions were.

Q What was the essential difference in your mind as it was established in the group between the questions used on the sergeant's exam and -- pardon me -- the questions used on the lieutenant's exam that were not used on the sergeant's exam? How did you reach the decision?

A The way I personally reached it was as Mr. Siegal had indicated in the beginning, try to think of examples, situations, which you have found yourself in and then relate the questions accordingly.

I tried to think would a sergeant run into this situation or would it be the lieutenant who would run into this particular situation. If they would both run into it, which one would it happen to more frequently, if you will. And accordingly I made my suggestion that this particular question should be for both sergeant and lieutenant, this

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one should be just for sergeant, this one should be for lieutenant.

MRS. GORDON: Your Honor, I forgot to do this on direct.

Q Is the Manual of Correctional Standards recommended reading material in the academy training course?

A Yes, it is.

MRS. GORDON: I would like to put this into evidence as Defendants' Exhibit N.

Any objection?

MR. BALLER: No objection.

(Defendants' Exhibit N was received in evidence.)

MRS. GORDON: That's all, your Honor.

THE COURT: May I ask a question with regard to that?

Do you know what the educational requirements are for a correction officer, how much schooling he has to have?

THE WITNESS: Yes. He has to have a high school equivalency. That's the minimum requirement.

THE COURT: In your opinion, is anyone who has a high school equivalency capable of reading and understanding this manual?

THE WITNESS: I think so.

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THE COURT: You do?

THE WITNESS: Yes.

THE COURT: All right. Thank you very much, Captain Sperbeck.

MRS. GREENBERG: May I ask one more question?

THE COURT: If it's only one more.

MRS. GREENBERG: It is.

RECROSS EXAMINATION

BY MRS. GREENBERG:

Q I would like to show you again Plaintiffs' Exhibit 18.

MR. KANTOR: Objection, your Honor. If she is going into another question I think it is improper recross.

THE COURT: It is, but I will allow it anyway.

MRS. GORDON: We withdraw the objection.

MRS. GREENBERG: It is directly related to the direct.

THE COURT: If it is related to the redirect, it certainly is allowed.

Q You stated on redirect -- you mentioned that one of the law questions that you drafted was question number 3:

"Which one of the following can maintain a 'special housing unit'...."

Why does a sergeant have to know that?

A I drafted that question specifically to find out

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if -- you see, chapter 5 and chapter 6 are relatively new regulations in our department. I was trying to find out if they had read chapter 5 and chapter 6 and were they familiar with it and without being too specific as to exactly what can happen and what time.

Q Would a sergeant have occasion to apply his knowledge of that rule as a sergeant?

A I think so.

THE COURT: Wait a minute. A sergeant never has to determine whether there is going to be a special housing unit, does he?

THE WITNESS: No, he doesn't have to determine.

THE COURT: He is either at one or he isn't at one, is that correct?

THE WITNESS: There is either one at the facility he is at or not.

THE COURT: Right. It may be a good way for you to find out how broadly he has acquainted himself with the literature relating to your profession, even though it may not apply to him, is that a fair statement?

THE WITNESS: Right.

BY MRS. GORDON:

Q In your opinion, is a sergeant required to know the rules and regulations of the department as set forth

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codes, rules and regulations of the State of New York for correctional services?

A Yes. As a matter of fact, most of the --

THE COURT: Let's not open this up all over again.

MRS. GORDON: I want to establish whether the Chapter VI he is talking about is part of this book.

THE COURT: I know, but we know that doesn't solve the problems we have here whether these questions are job related or not.

MRS. GORDON: Thank you, Captain.

THE COURT: Thank you very much, Captain.

(Witness excused.

MRS. GORDON: Your Honor, my next witness is our expert. I haven't been able to spend too much time with him during the course of this trial. If we are going to have a lunch break --

THE COURT: Where have you been during the last four or five days?

MRS. GORDON: Here. If we are going to have a lunch break, could we take it now?

THE COURT: Nothing would please me more. How are we doing on time? How much time do you think the direct examination of your expert will take?

MRS. GORDON: At this point, your Honor, I would

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think no more than 50 minutes.

THE COUR T: Five-oh?

MRS. GORDON: Five-oh.

THE COURT: That is shorter than I expected.

MRS. GORDON: I hope.

THE COURT: I assume you can complete cross examination by the end of the afternoon if we stay here until 4:15 or so.

MR. BALLER: If Mrs. Gordon has 50 minutes, I am confident we will, but my cross examination I don't think will be shorter than that.

THE COURT: I wouldn't expect it to either.

Then you would be resting, right?

MRS. GORDON: That's right.

MR. BALLER: May I suggest that perhaps we could qualify the expert before breaking?

MRS. GORDON: I would be glad to do that. That, however, happens to be one of the problems. We seem to have lost Dr. Taylor's vitae in our mail room. I don't want to take all the time to qualify him directly through testimony if we can possibly find the vitae.

THE COURT: Is there going to be any question about his qualifications?

MR. BALLER: Yes, sir.

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THE COURT: There is?

MR. BALLER: Yes, sir.

THE COURT: Then we had better do it by testimony, anyway.

MRS. GORDON: Then let's get started. Fine, your Honor.

Dr. Taylor, would you take the stand, please.

MR. BALLER: Before Dr. Taylor is sworn, I think I can shorten the qualification process.

Please be seated. Don't let me hold you up standing.

We would like the vitae of Dr. Taylor to be in evidence. We do not question his qualifications as a competent expert and professional in the field of employee selection procedures, testing devices and so on. We do question his competency to testify as to the facts in this specific case, and I am sure if Mrs. Gordon wants to qualify him very briefly on his general qualifications, we won't contest that.

MRS. GORDON: I was speaking in terms of qualifying Dr. Taylor as an industrial psychologist. I think testimony will come out in the questioning what he bases his opinion on.

THE COURT: I know, but the first matter I apparently

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am going to have to decide is whether I agree with you or Mr. Baller that however eminent Dr. Taylor may be in his field, he isn't for this particular case. So let's go on asking him about his background.

MRS. GORDON: Your Honor, I think Dr. Taylor's competence in terms of how we are planning to use it in this case --

THE COURT: Ladies and gentlemen, we waste more time talking about what we don't have to do. Let's go ahead and do it. Find out. Let me hear about the gentleman. Stop wasting time.

E R W I N K. T A Y L O R, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. GORDON:

Q Doctor, when did you first become --

MRS. GORDON: Excuse me, your Honor. I am a little confused. Is it stipulated --

THE COURT: Let's go right ahead as if there had been no discussion at all and you were starting to qualify your witness.

Q Dr. Taylor, what is your profession?

A I am a management psychologist.

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Q And what degrees do you hold?

A B.A., M.A. and Ph.D., all in psychology.

Q And where are you currently employed?

A By the Personnel Research and Development Corporation --

THE COURT: I am sorry. I didn't hear that.

A Personnel Research and Development Corporation.

Q And what position do you hold there?

A Chairman of the board and director of research.

THE COURT: Can you tell me something about that organization?

THE WITNESS: Yes. It was organized in 1955 by myself and two of my graduate -- former graduate students, Edward C. Nevins and Richard S. Barrett, who were respectively I believe vice president and secretary-treasurer.

THE COURT: All right, thank you.

Q Have you had occasion during the course of your career to render services to government agencies?

A Yes.

Q Would you please briefly describe the types of services you have rendered.

A My first position after obtaining my doctoral degree --

THE COURT: Where did you obtain it?

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THE WITNESS: Northwestern University, all three degrees.

Q What were the three degrees?

THE COURT: B.A., M.A. and Ph.D.

MRS. GORDON: I am sorry to interrupt.

A I was an examiner with the Illinois Civil Service Commission, where I constructed, administered and analyzed examinations, a position similar to that that Mr. Siegal holds now with the State of New York.

During the course of that employment, I did work with subject matter, working with experts, participated in the construction of examinations for what were then called prison guards and for numerous other occupations.

On July 1, 1943, I was employed by the personnel research section of the Adjutant General's office of the Department of the Army as a personnel technician and remained there until -- in the government service until late 1951. This was during World War II, and the personnel research section was responsible for the preparation of selection and placement devices as well as their standardization and validation for both military and civilian personnel.

For a period of about nine months I was assistant director of the civilian personnel subsection, which constructed and validated numerous tests for civilian employees,

very similar -- as a matter of fact, what happened during the war was that the Department of the Army took over the civil service testing function for its own employees.

Q What relationship have you had with Western Reserve and what did you do there?

A Let me finish first.

Q I am sorry. I beg your pardon, Doctor.

A After leaving the army, the Department of the Army -- I was a civilian, not a military personnel -- I was at various times director of contract research or subcontract research, as the case may have been, for various government agencies, including the navy, U. S. Public Health Service, the army and the air force and maybe others that I don't recall.

Subsequently I have been retained as an expert witness and consultant by the Federal Civil Service Commission, the Philadelphia Civil Service Commission. I think, but I am not sure, that the firm is in the process of being retained by the Flint, Michigan, Civil Service Commission, but I have been running around too much in the last two weeks to find out whether that has been definitive or not.

THE COURT: To what year does this bring us now, Doctor?

THE WITNESS: To the present in terms of operations

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for government agencies.

THE COURT: For the last five years or ten years, would you tell me what your general scope of work has been? It is not quite clear to me by your sayingyou have been retained.

THE WITNESS: In the last several years, I have been retained by the Federal Civil Service Commission and the Philadelphia Civil Service Commission primarilyas consultant and expert witness in EEOC cases, and have served civilian industry in thatcapacity in many more instances.

THE COURT: With regard to matters of discrimination?

THE WITNESS: Yes.

THE COURT: In testing?

THE WITNESS: In testing and other aspects of the selection process.

THE COURT: Thank you.

Q What relationship did you have with Western Reserve and what did you do there and when was it?

A At Western Reserve, where I was employed from 1951 until 1955, I had a dual appointment as professor of psychology and director of the Personnel Research Institute, which was a university-operated consulting firm.

THE COURT: Director of what?

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THE WITNESS: Personnel Research Institute.

I also, in that dual capacity, directed the work of a number of graduate students on research done on various government contracts.

Q What relationship have you had with the American Psychological Association, if any?

A I have been a member of that organization since about '39, was elected a fellow about 1945. I have been on the council of the Americal Psychological Association which is separated into specialty areas. I served as both secretary and later president of what was then the Division of Industrial Psychology and which is currently known as the Division of Industrial and Organizational Psychology.

Q Is that Division 14?

A That is Division 14. I am also a fellow of that division and of Division 5, which is the Division of Evaluation and Measurement.

Q Could you tell us some of the publications, some of the books and articles you have written, if any?

A Well, I have written -- co-authored usually, because I like to work in conjunction with other people -- numerous articles, I have actually lost count, most of them pertaining to selection and criterion problems, validation problems. I have published numerous validation

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studies both pre and post the Civil Rights Act of 1964. As a matter of fact, most of my career has been highlighted by my concern with criterion development and selection instrument validation. Two of the major publications which have been frequently reproduced in books, both of which were co-authored with Hubert A. Brogden, are The Theory and Classification of Criterion Bias published in Educational and Psychological Measurement, and the Dollar Criterion published in Personnel Psychology. The last journal was founded by myself and two colleagues in 1948 and edited or co-edited by me for a period of eleven years.

THE COURT: Journal of Psychology?

THE WITNESS: Personnel Psychology is the title of the journal.

THE COURT: I see.

THE WITNESS: I am still a member of theeditorial board of that journal.

Q When did you first -- pardon me.

MRS. GORDON: I move that Dr. Taylor be qualified as an expert witness in industrial psychology and employment selection procedures.

MR. BALLER: In order to make my position clear and try to do it in the least time possible, may I ask Mrs. Gordon if she intends to elicit testimony from Dr.

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Taylor with respect to the facts of this case, this examination and the correction sergeant job?

MRS. GORDON: We intend to elicit testimony from this witness, your Honor, with respect to his opinion on validation forms and processes. We intend to elicit from this witness, your Honor, testimony with regard to documents already in evidence in this case. We do not intend to elicit from this witness certain conclusions based on I assume what counsel means is conversations that he might have had with individuals or, indeed, even testimony taken in this court.

THE COURT: I am not sure whether you are answering Mr. Baller's question.

Has she?

MR. BALLER: In part. I do not have any objection to Dr. Taylor's being qualified as an expert and testifying in the first area Mrs. Gordon mentioned, validation procedures, selection procedures, formulation of relevant criteria, and so on. I do, before he is qualified to testify on any documents in this case or anything else relating to this case, particularly request the opportunity to examine him on voir dire.

THE COURT: We will leave that question open. Frankly, I don't see why I can't listen to his testimony

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just subject to normal cross examination.

MR. BALLER: May I make my position clear? It is my position, which I would like the opportunity to develop, that although Dr. Taylor is unquestionably an eminent expert in his field, he does not have sufficient familiarity with this case to give any competent testimony on the factual issues that are directly before this court as opposed to the theoretical issues.

THE COURT: I understand that to be your position. I will leave open the question of whether voir dire is necessary or whether the gaps, if they exist, in his knowledge can't be brought to my attention on cross examination.

MR. BALLER: May I also point out, before Mrs. Gordon asks him any questions about the documents or the facts of this case, nothing in her qualifying process has indicated that he has any knowledge of the case, and my point is indeed he does not have professional and a sufficient degree of knowledge.

THE COURT: I understand your position now. I will have to judge each question as it arises. If he is asked an opinion about something on which he has no information, either he shouldn't answer it or, if he does answer it and it is brought out to me, I will disregard the answer.

MRS. GORDON: I will certainly try not to ask

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Dr. Taylor that kind of question.

THE COURT: To give you time to confer with Dr. Taylor, we will adjourn now until 2:00 o'clock. I will give you the normal lunch hour plus a half hour.

MRS. GORDON: That is kind of you.

THE COURT: I want to be sure that this is your final witness.

Is that correct?

MRS. GORDON: Your Honor, we consider this our final substantive witness. At this time this is our final witness.

THE COURT: Except for the validation of that one document yesterday, I don't know of any other witnesses you had in mind.

MRS. GORDON: Plaintiffs attempted to draw certain implications from personnel records and, indeed, they put on a witness on the petition circulated at Ossining in terms of what we put in on the class action. Frankly, I consider those implications to be very minor. I don't care to take the court's time to put on a witness in that regard. However, if there is any question, I have witnesses who can testify to that and I don't, obviously, want to foreclose my proof.

THE COURT: If the court feels that there is a

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question, you can put on a witness on that minor point, which I don't even recall.

Other than that, is Dr. Taylor your last witness?

MRS. GORDON: Absolutely.

THE COURT: On rebuttal do you expect to call anybody except an expert witness?

MR. BALLER: We are considering the possibility of recalling the witness Hayes. It will be for less than three minutes if we do.

THE COURT: So I assume you will be able -- I mean we will be able to wrap up rebuttal on Monday.

MR. BALLER: I think so, yes.

THE COURT: I will see you at 2:00 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

2:15 P.M.

MRS. GREENBERG: I would like to take this opportunity to ask that I be excused on Monday. Having thought this would be a five-day trial, I made rather elaborate travel plans. Mr. Baller will be here and he will be examining.

THE COURT: As long as I go along with you, Mrs. Greenberg, it is perfectly all right. I wish you a very happy trip.

Dr. Taylor, will you resume the stand, please.

E R W I N K. T A Y L O R, resumed.

DIRECT EXAMINATION (CONTINUED)

BY MRS. GORDON:

MR. GORDON: Your Honor, happily in the break we received copies of Dr. Taylor's curricula vitae. I would like to offer it in evidence as Defendants' Exhibit EE.

THE WITNESS: There is one typo that I noted.

THE COURT: Let's mark it first, Doctor. We will receive it in evidence and then correct it.

xxx (Defendants' Exhibit EE was received in evidence.)

MR. BALLER: We certainly have no objection to that.

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THE COURT: I assumed so. It is very generous.

Q Dr. Taylor, I think -- would you just look at EE. I think the type has been corrected.

A Yes.

THE COURT: Why don't you give me a copy in accordance with the practice of your keeping the exhibit.

Has this been corrected, too?

MRS. GORDON: Yes.

Q Doctor, I show you a series of documents marked Defendants' Exhibit E in evidence and ask you have you seen this material before?

A Yes, I have.

Q Have you reviewed all or parts of that material?

A I reviewed rather carefully the document condensations of visits to two of the institutions.

THE COURT: Which two, Doctor?

THE WITNESS: I believe Greenhaven, which is dated May 26, 1970, and has a letter E on this copy; Auburn, I believe, and Elmira. I reached at that point what appeared to be a point of diminishing return where I was getting no additional inputs and scanned the others.

Q What, in your professional experience, is an appropriate label for those types of documents, if there is one?

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A Well, I would call them condensations of the results of intensive job information gathering or job analysis.

Q In your experience, have you seen similar materials?

A Hundreds of times.

Q Are these materials, in terms of your experience, more or less comprehensive than the types you run across?

A They are considerably more comprehensive.

THE COURT: By that I take it you mean they give more detail than the average such document.

THE WITNESS: More detail than is normal, particularly in industrial situations. And I presume from reading them that they are themselves a condensation --

THE COURT: They what?

THE WITNESS: They themselves constitute a condensation of even more elaborate notes, memoranda and materials that these were based on which were gathered by the participants in the survey. This is an inference.

Q Have you seen Plaintiffs' Exhibit 4 entitled Correction Officer Series?

A Yes, I have.

Q Can you give us a characterization of that type of document?

A Yes.

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THE COURT: Hold it just a minute so I can look at it myself.

(Pause.)

THE COURT: All right.

A I would characterize it as a description of the specifications of a job family.

Q In your opinion, is material such as found in Defendants' Exhibit E, that large stack of documents, appropriate for revising job descriptions or job definitions as they are found in Plaintiffs' Exhibit 4?

A You are asking if this could result in the revision of this?

Q Right.

A Yes.

THE COURT: Just to make it clear, Dr. Taylor was saying Defendants' Exhibit E could be used for the revision of Plaintiffs' Exhibit 4?

MRS. GORDON: Right.

MR. BALLER: I understood the question to be could documents of the type of Defendants' Exhibit E be used to revise documents of the type of Plaintiffs' Exhibit 4.

THE COURT: I think that was the question. But the question was this, which are the documents which are in evidence --

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THE WITNESS: Both generically and specifically.

MR. BALLER: If that is the answer, I would like to object to the question to which that's the answer.

MRS. GORDON: I will rephrase the question.

MR. BALLER: We have it in. I would like the court to understand that I do object to that kind of specific testimony by Dr. Taylor and would like the court to reserve its ruling on his competency to make that kind of testimony pending my cross examination.

THE COURT: As I said earlier, it is important for you to make your position clear on the record, Mr. Baller, and I hope you won't do it more often than necessary. As far as I am concerned, I understand it. I won't rule on it one way or another. If I later find out what you showed the doctor is not competent, I will disregard it and strike the answer.

BY MRS. GORDON:

Q To be clear, Doctor, what I am asking you is, is the material in Defendants' Exhibit E appropriate material for revising Plaintiffs' Exhibit 4, in your opinion?

A Very much so.

Q Have you seen Plaintiffs' Exhibit 8, sub test descriptions -- I won't characterize it. It says what it is on it. Plaintiffs' Exhibit 8.

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A Yes, I have.

Q In terms of creating a selection program, do these materials, that is, Plaintiffs' Exhibit 4, Defendants' Exhibit E and the sub test descriptions or K, S and A that I just showed you, are they part of an analysis procedure?

A Well, I would say Defendants' Exhibit E is part of a job analysis procedure. I would say that Plaintiffs' Exhibit 4 and Plaintiffs' Exhibit 8 are in effect parts of a job description which would be further condensation of such materials and others, perhaps, appropriate for use in the construction of selection instruments but not necessarily exclusively so.

Q Is a job analysis a process or a product?

A It's a process, in my estimation, although the term is used quite loosely.

Q Are you familiar with the EEOC guidelines?

A Yes.

Q That is Plaintiffs' Exhibit 27 in evidence. Showing you Plaintiffs' Exhibit 27.

Are you also familiar with the APA standards, Plaintiffs' Exhibit 26?

A Yes. I don't know it by the exhibit number. I am familiar with the APA standards. They are referred to in the guidelines.

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Q What purpose, in your opinion, are the APA standards intended to serve?

A Primarily to serve the publishers of educational and perhaps industrial tests in the necessary or desirable procedures to pursue in developing a test, analyzing a test prior to release and what materials are essential, highly desirable or desirable to include in the manual that is normally prepared by test publishers upon the release of a test for sale.

Q To what extent, in your opinion, are the APA standards applicable in the civil service context?

A Since the civil service commissions in larger jurisdictions are normally engaged in the construction of both aptitude and achievement tests, the manual would establish desirable standards for them to pursue within the limitations imposed by law in some cases upon the civil service commissions in the development of their test, although civil service commissions do not normally publish test manuals for people -- other people to judge whether they want to buy a test or not.

THE COURT: Is it my understanding you are saying the APA standards would be useful to civil service commissions in the construction of tests?

THE WITNESS: In the construction of tests, I

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believe so.

Q Are there certain practical or legal considerations to be taken into account in the civil service context with reference to the APA standards?

A It could vary from jurisdiction to jurisdiction. It's extremely difficult if not legally impossible, for example, in many civil service jurisdictions to pretest items on a population other than is going to be exposed to them meaningfully so you can follow the practice of writing more items than you will need for a given test with the knowledge that except by item analysis there is no way of knowing whether a given item is really desirable or not meets the conditions and standards of item characteristics.

Q Is that in the area of item reliability?

A It would be in the area of poor distractors, of mis-keying, of inconsistency with the particular subject matter area in which the item was supposed to function.

Now, all of these in a commercially available test are normally pretested and we provide -- when I say "we" I am speaking of the profession generally -- for an attrition of about 50 per cent of the items we write and take the best 50 per cent to make the test.

Q Do you have an opinion of the usefulness of the EEOC guidelines?

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A To whom?

Q Well, I refer you to I believe it's 1607.5 of the EEOC guidelines.

A That's the minimum standards for validation.

Q You are probably right, Doctor.

A I know it is the title. I was reading from the copy I have.

Q I believe it's 1607.5(a). There is a term used "feasibility."

Is it clear to you what the meaning of "feasibility" is within the EEOC guidelines?

A It not only isn't clear to me, it isn't clear to EEOC, since in my experience it has been variously defined by EEOC compliance and review officers in different circumstances and different situations.

I was told by Dr. Ennis --

MR. BALLER: I would like to object to this as hearsay if it is offered for the purpose of showing that what Dr. Ennis said was true.

THE COURT: I think it would have to be hearsay.

MRS. GORDON: Right. The point of the question was whether or not Dr. Taylor understood -- whether or not he believed the term was clearly defined in the guidelines.

THE COURT: I will allow him to go somewhat

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further than that if he wishes to state that other members -- not members -- that persons having an official responsibility to define or apply the word "feasibility" from this paragraph have informed -- I mean have advised the witness that thei own interpretations are, on the one hand, one thing and on the other another. That doesn't mean I accept the interpretations but it would be relevant, in my opinion, if people responsible for the interpretation of this thing told you that -- gave you different interpretations.

A I had occasion shortly after the publication of these guidelines to visit with Dr. William Ennis, who is the EEOC psychologist, in the company of members of a client firm, and our specific purpose was to get some clarification of the guidelines in preparation for the design of a validity study.

I asked Dr. Ennis what "feasibility" meant as it appeared in the guideline, and he was primarily concerned and said was the size of the sample adequate.

I then asked what does EEOC consider to be an adequate sample. He said that would yield -- and I am paraphrasing, I am not quoting -- he said one that would yield validity significance at the 5 per cent level, which is a requirement of the guideline.

THE COURT: Five per cent is .05?

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THE WITNESS: .05, which is a circuitous definition and I tried to pursue it further and asked him specific N's.

"Would you say an N of 50 is feasible and a hundred is feasible?"

He just replied, in essence, that the risk of getting a validity not significant at the 5 per cent level was the one that the validator took.

THE COURT: I understand that, but I don't quite understand why that establishes there are varying interpretations, or did you not mean to say --

THE WITNESS: Quite varying. What he in effect said is feasibility is the size of the sample that the validator is willing to risk, and for my own purposes I established arbitrarily that any situation in which you don't have 100 cases is not feasible to do a validity study.

Feasibility is also used --

THE COURT: Just a minute, please. It is abstruse for me and I want to make sure I understand it. I am not clear, Dr. Taylor, whether it is your thesis that more than one person having responsibility for the definition and application of this term in this regulation have among them different views as to what the term means or whether you are saying, and so far you have only talked about Dr. Ennis,

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that in your opinion Dr. Ennis' definition is not a sound definition. Now, those are two different propositions.

THE WITNESS: I think I am saying precisely the first one.

THE COURT: You have only talked about Dr. Ennis and that can't be inconsistent with himself or, if it is, then it is what I call not sound.

Now, are you also going to be telling me about the expressed views of some other persons which differs from that of Dr. Ennis?

THE WITNESS: No. What I am saying vis-a-vis Dr. Ennis is that I in effect went to the source.--

THE COURT: I understand that.

THE WITNESS: -- for an official definition and could not obtain a specific number.

THE COURT: That I can understand, too. That is very clear. That's not my definition of inconsistency. It is just a definition of either frustration or unsound thinking or something of that sort. I understand what you are telling me now.

THE WITNESS: I would also say that it is my opinion that a poll of a group of qualified industrial scientists to define "feasible" as used in this particular paragraph would yield a variety of different answers.

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Q What is a criterion validation process?

A It is a process by means of which the relationship between a predictor -- I am speaking of it in the selection sense, a selection device usually in the area of aptitude, social skills, personality and the like -- is established with some unbiased measure or criterion of performance by the individuals subjected to the device for that portion of the job that that particular device is intended to predict.

Q Are there certain areas to which the criterion validation process is particularly suited?

A Well, practically excluded. Good criteria, sound, unbiased, uncontaminated measures of performance in delineated areas of a given job, are extremely difficult, if not impossible, to construct.

Q Would you describe those areas particularly as they relate to this case? By that I mean those areas where you find that the criterion validation process is either not suitable or less suitable and at this point I ask you --

MRS. GORDON: Can I have Plaintiffs' Exhibits 18, 19 and 20?

THE COURT: In the light of Mr. Baller's objections in the past, would you mind asking the witness some

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questions as a foundation with regard to his knowledge of the issues in this case?

MRS. GORDON: Yes.

Q I am directing your attention, Dr. Taylor, to selection procedures in the promotional context.

MRS. GORDON: I think the record is clear that that is what we are dealing with in this case, your Honor.

Q I ask you whether you have seen Plaintiffs' Exhibits 18 and 19, to wit, examination 34944, previously?

A Yes.

MRS. GORDON: We are talking, obviously, in the context of examination 34944, and I believe the witness has stated he has seen the class specifications for the series.

THE COURT: When you say you have seen them, can you tell me to what extent you have reviewed them?

THE WITNESS: I have read all of the items.

THE COURT: Thank you.

Q In terms of the criterion validation process or other processes, what process do you believe is most suitable to an examination in the context in which we are dealing with 34944, to wit, a promotion examination from correction officer to sergeant?

A In a situation in which a person is required to, in certain aspects or all aspects of the position for which

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he is being examined, be immediately functional and competent, a criterion validated test is of little practical value. Here you are not predicting but rather measuring a skill, knowledge or ability.

THE COURT: Wait a minute. When you say you are not predicting, do you mean that the examination is not predicting or that the validation process is not predicting?

THE WITNESS: The validation process is inappropriate, your Honor, in that the task is not to predict --

THE COURT: The task is not. I understand you now.

THE WITNESS: The task with respect to a job, whether it be a promotional job or some other requiring that at the time the person gets the job he has certain established knowledges, techniques, skills, etc., the predictive process is of no merit. You are actually measuring or need to measure the degree to which candidates at the time of their examination possess those skills, knowledges, techniques, abilities which are required to perform on the job when, if and as appointed thereto.

Consequently, you need an inherently valid measure, not predictor, of those knowledges, skills, etc. that the person must have at the time that he is asked to report for work.

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Consequently, in that kind of situation, you need not predictors of future performance but measures of current ability to perform.

THE COURT: I understand.

Q Doctor, I show you Plaintiffs' Exhibit 42 in evidence and ask you if you have previously reviewed that document?

A Yes, I have.

THE COURT: What is that, for the record?

MRS. GORDON: That is the criterion methods project grant proposal.

Q Now, I assume given your review of that you are aware that the group at Civil Service or at least a portion of the Department of Civil Service that was involved in 34944, to wit, Mr. Taylor, whose name appears there and whose name is also in evidence in this case as having responsibility in terms of 34944, are involved in a criterion method study.

Are you aware of that?

A Yes, it is described in this exhibit.

Q Do you have any opinion of their efforts in this regard in view of the position you have just stated, that you believe a content or inherent validation process more appropriate in situations such as promotion between

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correction officer and sergeant?

A I am not sure that I understand the question.

THE COURT: Do I understand you to be asking Dr. Taylor whether he thinks there is any value to such a study in the light of what he just said?

MRS. GORDON: Exactly. That's exactly my question.

THE WITNESS: Yes, I think there is research value from two points of view. Obviously the scope of the study encompasses, as I recall it, both correction officers at the entry level and higher level officers. Certainly at the entry level the development of criteria against which to validate selection devices is a highly desirable impact. At the higher levels the study has two values. One would be is it practical -- is it possible to develop criteria which is as good -- as adequate measures as the performance area measured by the tested question.

In other words, this becomes a -- the test becomes a standard against which to test your criterion development effectiveness so that you really are validating the criterion within these areas against a presumably content valid test, and this is a very badly needed exercise in demonstration of efficacious criterion validation methodologies.

Secondly, the sergeant's job I would assume

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encompasses activities beyond the scope of the five ability areas tested by this test. Some of these could quite conceivably be amenable to criterion validated selection devices. So I think it is a two-edge sword that makes it highly desirable as a research project.

Q In reference to the areas beyond the five sub tests that are covered by 34944, are you referring to the non-cognitive area of the job?

A I am not referring to anything specific. My extensive experience with all kinds of jobs and hundreds of job analyses leads me to the inescapable conclusion that in practically no job would five sub matter areas cover the entire scope of behaviors that differentiate effective from less effective performance. So I am in effect, on the basis of that broad experience, assuming that there would be other areas -- I don't know what they are and there should probably be some non-cognitive areas. There are in most jobs -- that would be amenable to criterion validated selection devices of various natures.

Q In your opinion, does any selection device or any set of selection devices ever cover the whole job? Do you ever know when you have reached the end?

A No. In the first place --

THE COURT: I don't think you need to expostulate

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on that. I believe even in your field it is possible to reach the absolute truth.

THE WITNESS: Especially in my field, your Honor.

THE COURT: We are pretty good at it, too, in the law.

MRS. GORDON: Thank you, your Honor.

Q What is a content validation process, Dr. Taylor?

A If that's really a validation process. The term is really one of convenience rather than scientific accuracy. It's the process by means of which you develop a measuring instrument through the use of recognized subject matter specialists in the area of inquiry very much in the same way that you go about developing criteria for that specific assignment, and that is you gather what information is available and to the degree and in such depth as is decided upon about the job. You separate these on a reasonable, logical basis into areas, rubrics, factors, call them what you will. This can be done in a highly sophisticated, mathematical, statistical fashion which usually yields about the same result as when done by skilled job analysts on a logical, experiential basis.

You then identify, with the help of subject matter specialists, as you would in developing criterion, what areas constitute relatively homogenous -- and I have to use

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the term "relatively" -- concepts or contents of the job, which may or may not be independent from each other, and from that point you would draw on your subject matter specialists, have them provide contents which sample that area, since obviously any given area is so broad that it would be impossible to take the whole universe.

Subject matter specialists would then provide content for an examination in that area. Test construction experts, since there are two specialties involved, both of which are necessary, would take those contents from the subject matter specialists and work them into items which reach the principal items of good item validation. No single item except as they represent the area would have particular pertinence and a test would not hang or fall on someone's opinion of a single item and say this item doesn't look pertinent to me if it is in fact a sample of a cogent area for which the test is being constructed.

Q I show you Plaintiffs' Exhibit 10, which diary excerpts, and ask you if you have reviewed this document?

A Yes, I have.

THE COURT: What is that?

MRS. GORDON: Diary excerpt.

Q If one takes Defendants' Exhibit E, which is that stack of materials, and Plaintiffs' Exhibit 4, which is the

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the class specification, and follows the events and procedures outlined in the diary excerpts, which is that Exhibit 10 I just gave you, does one have evidence of a content valid process?

MR. BALLER: I must object. There isn't any showing that Dr. Taylor has any information about the events in Exhibit 10 or, in fact, about Exhibit 10 itself.

THE COURT: You have read it, have you not, Doctor?

THE WITNESS: Yes.

THE COURT: Do you feel acquainted with it?

THE WITNESS: Yes.

MR. BALLER: Is the question then a hypothetical question based on the assumption that these events took place?

THE COURT: Yes.

MRS. GORDON: Absolutely.

THE COURT: I understand the question is a hypothetical question.

MR. BALLER: I am sorry, your Honor. I didn't understand it that way.

A I would say if these procedures were in effect followed, they would constitute the steps necessary but not necessarily sufficient to the development of a series of job related tests.

Q You said "sufficient." Do you mean by that you

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would have to assess the competence of the individuals involved in the process?

A Yes.

THE COURT: Competence of the test constructor to construct, you mean?

MRS. GORDON: Exactly.

A I would have to be assured of the competence of both groups, and even then a good process does not always guarantee that the end product will be a good product. You can go through the process -- a process religiously, following all the steps and being as conscientious and as talented and blow it. It can happen.

THE COURT: Sure.

A So from this I cannot say that this is or is not a job related test, but I can say this is a competent procedure by means of which a series of job related tests could be constructed.

Q I just would like to clarify both for counsel and for the court, you are not prepared here to assess the competence of, for example, the subject matter and experts involved in this matter, are you?

A I am not competent to assess them, nor would any industrial psychologist necessarily be. The competence of subject matter experts has got to be assessed by their

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peers. I would not be so --

THE COURT: I wish that were true, but I am afraid I am going to have to do it.

MRS. GORDON: Your Honor, I think at the conclusion of his testimony that is exactly the area that you will be left in, and I think, frankly, it is wholly appropriate, that being the function of a trial court.

Q I would like to get this outline a little bit clearer. You are obviously talking about a validation process such as in the content sense rather than a validation product?

A Precisely.

Q In your opinion, is there a distinction to be made in assessing the appropriateness of the process and assessing the appropriateness of the product, namely, in this context a given examination being the product?

A Yes. I consider myself professionally competent to evaluate the process. I know the processes by means of which an inherently valid subject matter test needs to be subjected to. I cannot say that, yes, while this is a competent process it necessarily produced the desired result.

Q Let me just ask you one further clarifying point. What types of professionals or paraprofessionals assess the product -- pardon me -- assess the process and the product,

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and are their competencies required to be different depending on the piece that they are looking at, that is, depending on whether they are looking at the process itself or whether they are looking at the product, here a given examination?

A The process, just as the job analysis process, is a process of developing test materials, and inherent in that process is the use of subject matter experts. The process is designed by the psychometric expert, but inherent in that process is the recognition that competent though he may be in the construction of psychometric devices he needs other subject matter specialists to provide content.

Q Now again to clarify, can an industrial psychologist perform both functions here, namely, design the process and then tell us whether it's content valid or inherently valid?

A Under some circumstances. I would say that if one were to be constructing a job related device for the job of psychometrician, I can serve since I am competent in both fields and, obviously, merged I could serve in both fields and in a dual capacity. But if I were asked to evaluate a test in a specialty in which I am not a subject matter expert, I would have no competence to either evaluate the items or the test as far as its content is concerned. I could evaluate the test as far as a measuring device.

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Q I see. Now, in this content validation or in a content validation process and in the context of this particular type -- this particular examination, are line officers with substantial experience in the title and succeeding titles considered subject matter experts? I am not asking you to evaluate whether or not they were expert, but whether or not they serve that function in the process.

A I would say in all probability such experience would be highly desirable, but such experience by itself would not necessarily make a person a subject matter specialist. One could spend years in the area and for any one of a number of reasons not be considered to have developed the depth of understanding that his peers would consider necessary for him to serve as a subject matter specialist.

Q What I am principally interested in is whether they could perform in that fole in a content examination, not go into the merits of what their input might be.

THE COURT: Can't I judge that on the basis of things that all people know?

MRS. GORDON: Surely.

THE COURT: The more experience you have in the field, the more likely you are to be a subject matter

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specialist. As the doctor pointed out, something may have happened. You may be a stupid man.

THE WITNESS: Or maybe you are not interested.

THE COURT: Or whatever it is.

MRS. GORDON: That is all I am trying to point out.

THE COURT: At least one of your subject matter specialists testified, so I have a feel of the kind of person he is.

MRS. GORDON: I understand that, your Honor. I just want to make it clear -- in fact, all along here -- that we have not produced Dr. Taylor to evaluate the competence of those individuals.

THE COURT: Very good.

Q Now, for example, I am sure you have noted that there is a report preparation and supervision sub test on 34944. What I want to ask you is this: Are the people who prepare such sub tests in a given examination, can they be considered subject matter specialists?

And in this context I would like you to assume that the areas, those two areas, of the examination were approved for inclusion in this case it happens by a deputy commissioner with substantial line experience but were assigned to an in-house Civil Service unit by Mr. Siegal for the writing thereof.

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A I would say --

Q The personnel examiner, excuse me, not Mr. Siegal.

A I would say that in any area it is the responsibility of whoever is in charge to find and utilize the people most competent as subject matter specialists in that area.

Now, in making exams, you might use a variety of subject matter specialists depending upon what they were, what the areas were, and you would pick in each area the people who were most knowledgeable and most competent in that particular area, and they might not be the same people and they might be the same people.

Q In the context of the content validation process as we have discussed it, is it acceptable to develop K, S and A's while you are consulting with the subject matter experts? And here I have particular reference to the K, S and A's for the laws and methods and judgments sub tests on this examination.

A The K, S and A is a document that is, particularly in the format we have here, unique to this jurisdiction. Certainly during the examination development process it is the responsibility of the test construction expert in charge to fully utilize the competencies of his specialists, and if these result in revisions, additions or deletions of

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the areas, revisions of the areas, it would be a dereliction of the test constructor's responsibility to not attend to them. No job --

THE COURT: I don't doubt what you say. It seems to me so obvious I wonder if it differs from that of any responsible person who calls on experts to assist him in reaching a decision and if they come up with something that he ought to change it, he ought to change it.

THE WITNESS: That is what the essence of counsel's question was.

THE COURT: Yes, it was.

Q Now, obviously, in view of your position I don't ask you to comment on whether or not you think examination 34944 is in fact content valid, but what I would like to ask you is have you been able to determine whether or not the examination is a well-constructed test?

A I would prefer to refer to them as examinations.

Q All right.

A Since actually they are -- well, put in the same test booklet relatively independent tests and not in the correlation sense of different areas which may or not be related.

Mrs. Gordon-

THE COURT: As to this examination, as you call it, which is perfectly all right with me, do you have

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any opinion as to whether it is well constructed? And in answering that question, if you do have an opinion would you please define for me what you mean by well constructed.

THE WITNESS: Yes, I do have an opinion. It is based on my examination of the item analysis data which in my opinion is the only basis on which you can judge how well constructed a test is. Certain limitations are imposed upon it, a total of 75 items which limited to 10 or 15 items each segment, but on the basis of that information, my conclusion is that while it is not a perfect test -- there has never been, to my knowledge -- it is a competently constructed measuring instrument. Each is a competently constructed measuring instrument.

THE COURT: Each sub test?

THE WITNESS: Each sub test.

Q Doctor, I show you Defendants' Exhibit H in evidence which we have referred to as an ethnic item analysis.

THE COURT: That is H?

MRS. GORDON: H in evidence. Your Honor, could we possibly borrow the court's copy? I would gladly give you the substitute.

THE COURT: You can borrow it if I can find it.

Q Defendants' Exhibit H in evidence, and ask you if you have reviewed this data. Look through it.

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A The data which I examined appears to have been the same as this except that the several pages were ethnically identified. In other words, there was a set marked black, there was a set marked Hispanic and a set marked white, but I think these are the same without those.

Q Would it help you, Doctor, if we identified the pages?

MRS. GORDON: This is unquestionably the ethnic item analysis. It is supposed to be black this page and Hispanic.

A Probably the number of candidates identified the first five pages as black. The next page is frequency disbributions in the way that EDP people produce them to confuse us. Pages 11 and 12 are obliterated. This will be 13, I presume. 14, 15 I would identify, since there are 1323; more or less candidates, as white.

THE COURT: Can we go ahead on that subject assuming he is correct?

MRS. GORDON: I just wanted to establish that.

Q Can you tell us how you can determine -- and you stated that you have found that it is a competently constructed examination -- how you can determine from that data that it is so constructed? If you have a clearer copy I am sure we won't mind if you use yours.

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A It is a principle of proficiency examinations, which these five examinations are, that by virtue of the necessary absence of any external criterion the test as a whole is a better measure of that area of proficiency than any single item within the test. It is standard practice, therefore, to use the total score on the test, breaking it down into either a high and a low group or using it as a continuum, as a basis for judging the value, the competence of each of the given items. In essence, Defendants' Exhibit H has done just that for each of the ethnic groups. Since the number of applicants in the Hispanic group was only 15, I question the value of that as a separate group.

THE COURT: Putting APA aside now, I understand as to why you say this is the right way to go about it, but accepting your statement that this is the right way to go about it, what did you get from looking at this material which enabled you to determine that the sub tests had been competently constructed?

THE WITNESS: Well, I got the item difficulty of each item, that is the per cent of the population that answered correctly and incorrectly, and that distribution range in laws, rules and regulations from the most difficult item, which was answered correctly by 19 per cent of the population, to the easiest item, which was answered correctly

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by 87 per cent -- no, you shouldn't really count that. That is item 13 which was -- what shall I say? -- adjusted to 85 per cent and the dispersed value between indicate a good distribution of item difficulty.

THE COURT: What does that mean to you?

THE WITNESS: It means to me that the test is so constructed that there was no item so easy that everybody got the correct answer, there was no item so difficult that nobody did.

The range of the difficulty was appropriate for the population to which it was administered.

They also did item test correlations which were all positive. What I am saying about laws, rules and regulations generally pertained through all the other sections only with minor variations.

The overall difficulty of the tests were reasonable as indicated by the means, although some parts of the test were more -- some of the tests were more difficult than others.

It was interesting, parenthetically, to note that the difference between the difficulty of one segment of the test to another far exceeded the difference within a given test of minority and majority candidates.

THE COURT: Say that again, will you, or will

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you read it back, Mr. Reporter.

(Record read.)

THE WITNESS: May I illustrate that, your Honor?

THE COURT: Yes.

THE WITNESS: Bypassing the Hispanics for the moment, although they would give more weight to my thesis in some areas, in all except one area, the mean of the majority population on laws, rules and regulations was 6.84, the mean of the black candidates was 6.05, a difference of .79.

On 485-E-1, which is methods --

MRS. GORDON: 485-E-1, 16 through 30. That is methods and practices.

THE WITNESS: The mean on the white population is 11.14, a difference of almost 5 between the mean of the whites on section 1 and section 2, but the mean of the blacks on section 2 was 10.31, again a difference of less than one point.

THE COURT: The variation of the races within a given test was considerably less than the variation --

THE WITNESS: Of a given race, across test.

BY MRS. GORDON:

Q Doctor, I am primarily interested in this problem at this point from the construction of the test point of

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view rather than from the ethnic point of view.

Would you care to elaborate any further on how you determined that this was a well-constructed test?

A Yes. I also looked at the keyed response both for the whites and the blacks, and in every item, including those that were adjusted later, the keyed response was selected by a higher proportion of the high criterion group than the low criterion group. This was true for every item in every sub test.

THE COURT: What is the high criterion group?

THE WITNESS: The high criterion group in this particular item analysis is the 50 per cent of each ethnic group scoring highest --

THE COURT: Each ethnic group?

THE WITNESS: Yes. This does not obtain with respect to the 15 Hispanics.

THE COURT: I understand.

Q By the way, to get something clear, could you reach conclusions about the construction of the test in the absence of this ethnic differentiation we have here?

A Yes.

Q Assuming we gave you what we call the regular item analysis, which obviously doesn't have any ethnicity on it.

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A All that's added by this is the fact that the test is equally competent in its measurement of that, whatever each section measures, among the black and white applicants, that is, it is not a good test for whites and a bad one for blacks, or vice versa.

THE COURT: Are we getting there?

MRS. GORDON: Yes.

THE COURT: We are going beyond your time estimate.

MRS. GORDON: We are almost there.

Q Doctor, on the basis of the types of statistical elaboration you have been giving the court, is it possible to estimate on a statistical basis, at least, whether or not the given test has a high or a lot probability to job relatedness?

A No. I can only say these are good tests of what they test, and I can make that same conclusion without ever having seen the items, merely the item analysis.

Q How, in your opinion, is it appropriate to conclude whether or not a given examination is content valid?

A Only through the opinion of competent subject matter specialists. Even looking at the test I could not, as an industrial psychologist or even if I talked to half a dozen sergeants for a day or two, consider myself competent to look at the test and say, "Yes, this is a good sample of

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content from an area that is important in this job." I would have to have much more exposure before I would have any competence to assess the job relatedness of this test.

Q Let's assume that a deputy commissioner with extensive line experience in the sergeant title and in higher titles reviewed this entire examination after it was given and indicated his approval of it. Would you consider that type of reaction -- and I am not asking you to evaluate his competence, of course, but is that type of consideration at least some evidence to be considered in determining whether or not the test is in fact content valid?

THE COURT: I really don't think Dr. Taylor knows any more about that than I do, and I think he knows an awful lot. Of course if somebody at a level of responsibility approves the test that is some evidence that he thought that it was good and he is supposed to be trained and it ought to mean something.

MRS. GORDON: All I am trying to establish is in making that model the kind of subject matter expertise Dr. Taylor would look to.

THE COURT: It depends a great deal more on the people who do this work.

THE WITNESS: There is the converse, your Honor, if I may, that as a test construction expert I lack the

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competence and I am not expected to have the competence to make -- to have any judgment with respect to the pertinence of the content of a section of the test to a job.

THE COURT: You made it perfectly clear, Doctor.

MRS. GORDON: Just one or two last questions.

Q In merely looking at the items on a given test, can you determine whether the test is either properly constructed -- I mean by looking at them in terms of looking at them on their face -- properly constructed or whether or not it samples an appropriate content universe?

A No. I merely know whether it is face valid, which tells me nothing about its content or criterion validity.

MRS. GORDON: I just would like to turn for one moment, your Honor, to the non-cognitive areas -- potential non-cognitive areas -- of a sergeant's job.

Q By the way, in terms of a job analysis, Dr. Taylor, would you consider it appropriate to look to attitudes or behavior characteristics if you were going to examine a job like the sergeant title?

A Quite.

Q Is this the non-cognitive testing area?

A Yes, areas other than knowledges, skills and abilities, personality, social skills, the like.

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Q With reference to the types of examination or selection devices in that non-cognitive area, do they have to be criterion or construct validated?

A Usually.

Q Why is that?

A Because there the relationship to performance is more nebulous. In a content test it is an inherently valid test. It is direct and observable. You would need in the non-cognitive areas -- I think this could be a consensus of most of the industrial psychologists -- to relate the characteristics you find in your job description or job -- true job analysis to actual performance in certain aspects of the job and say, "Yes, it is important that he have such social skills." Otherwise you get over into the highly nebulous construct area, which is probably inappropriate other than experimentally.

Q Do you know of any non-cognitive tests that have been demonstrated either on a construct or criterion model to be validated in this context, namely, a corrections or correction sergeant context?

A I do not personally know of any. That doesn't mean it hasn't been done somewhere sometime.

MRS. GORDON: Thank you very much, Dr. Taylor.

THE COURT: May I suggest we give Dr. Taylor a

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short recess? If he doesn't want it, I do, anyway.

(Recess.)

THE COURT: Mr. Baller, do you want to go ahead and do your damage?

Am I correct, Mr. Baller, in believing -- I am not asking for any commitment, but to understand what your point was about -- that as it turned out Dr. Taylor did not testify in the area in which you objected to his testifying?

MR. BALLER: To the extent that his approval of the procedures used are based on his understanding that the documents summarizing them are correct, not the procedures themselves were done that way, he stayed clear of my objection. Consequently, I will be able to limit my cross examination considerably.

THE COURT: Great.

MR. BALLER: I would like very briefly, just for clarity, if your Honor will permit, to review exactly what Dr. Taylor did review in the case, however.

THE COURT: Sure.

CROSS EXAMINATION

BY MR. BALLER:

Q Dr. Taylor, you testified that you had reviewed several documents on questions by Mrs. Gordon. When was

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it that you first saw those documents?

A At various times since Tuesday night.

THE COUR T: In other words, starting two days ago?

THE WITNESS: Yes.

Q Had you formulated your opinion as to the propriety of the test development procedures, assuming that they were as reflected in the documents, again, by the time I interviewed you on Wednesday night pursuant to an agreement of counsel?

A It's very difficult for me to pinpoint the precise moment at which I had reached that conclusion. There are documents I read only once, there are others that I read several times. It is not unlikely that I was at least a part way in which direction at the time of our Wednesday night meeting.

Q My recollection is that you stated to me on Wednesday night substantially the conclusion with substantially the same qualification that you stated in court this afternoon.

Does that accord with your recollection of our conversation?

A I believe so, although I was not at that late hour as awake and alert as I might have been.

Q Would it then be fair to say that that conclusion

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was based on a fairly rapid process of becoming acquainted with what the procedures supposedly were as reflected in the documents?

A I would say in effect that conclusions with respect to the required procedures for the development of a job related test I had arrived at a number of years ago. All that was necessary at this point was to ascertain the extent to which these procedures, if they were indeed carried out as described, fit the model, and that could have been done in a matter of a half hour or an hour. I was not depending on developing a theory on the basis of this document.

Q I understand that. But that process of ascertainment, of fitting the actual process to the model which you know so well, did take place in the brief period of about a day?

A Yes, it did.

THE COURT: I understand you to say, in effect, as we would in our profession, that I know that it takes research in the books and it takes a review of the briefs of counsel and consideration of all questions involved, and this, that and the other, before I can possibly come up with a competent opinion, and if I did those things I might come up with a competent opinion and you would look to see if I did those things, is that right?

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THE WITNESS: Yes. I am not making any -- I did not formulate any opinion with respect to whether the content of what transpired in this proceeding was competent.

THE COURT: I said if I did those things. If the things you read about were done, that was the right way to do it, in your opinion?

THE WITNESS: Yes.

THE COURT: All right.

Q You haven't visited any of the New York State prisons, have you?

A Not voluntarily.

THE COURT: That is an intriguing answer.

Q Dr. Taylor, I was referring to your role as consultant.

A No, there was no need for me to.

Q And you haven't spoken to any correction sergeants about their job?

A No, there was no need for me to.

Q Have you spoken to any of the construction matter experts -- subject matter experts?

A I listened this morning to parts of the testimony of the captain who was on the stand. Beyond that, I saw no need nor did I request any exposure to those gentlemen.

THE COURT: Insofar as you listened to his testi-

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mony this morning, I don't recall anything in your own testimony that depended on what you heard this morning. Did it?

THE WITNESS: No, sir.

Q You didn't sit in on any of the other proceedings before your arrival at about a quarter past eleven this morning, did you?

A No, I did not.

Q And your testimony does not depend or rely on any review of the deposition evidence in this case?

A I have reviewed in part to date the deposition of Dr. Barrett. I do not believe that I have seen any other depositions. I do believe that some of the documents referred to this morning were parts of affidavits submitted either in the interrogatories or pretrial explorations by Mr. Sam Taylor.

Q Do you have any knowledge about prior sergeant examinations --

A No.

Q -- prior job descriptions or prior class specifications for a sergeant's job?

A None.

Q Would you have any basis for knowing to what extent the actual product, that is, examination 34944, was a product of the process which you reviewed and to what

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extent it may have been a product of just carrying forward what's been done in the past?

A I would neither have the need nor do I have any idea. It is not pertinent to my expertise.

Q With reference to your definition of content validity, do you understand that a content valid selection procedure is more appropriately used to select candidates into an eligible pool or more appropriately used to screen candidates out of an eligible pool?

A I don't think you do one or the other exclusively. By screening candidates in, you obviously screen the rest of the candidates out; by screening candidates out, you obviously, to the extent that there are vacancies, screen the rest in. They are two sides of the same coin.

Q Let me put it this way. By screening into a pool, I mean making it the exclusive or functionally exclusive means of deciding who will get the job, by screening out I mean making a preliminary elimination of some people who then might or might not be selected for the job by other selection procedures.

Can you state whether a content valid instrument is more competent for one or other of those processes?

A It is competent for both. Obviously there would be a point in a content valid series of tests where the

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person is so lacking in the required competencies that it would be unfair to lead him to believe that he was being further considered and it's only humane to so inform him at the outset.

Q With respect to the use of a content valid instrument to screen people in, as I have defined it, at least, do you have an opinion as to whether a content valid instrument is more appropriately used to establish a rank list of candidates for selection according to examination results or whether it is more appropriately used to establish a basic pool?

A There are -- and I will take an analogy from the military -- two concepts, philosophies, if you will, of promotion. One is "Fully qualified," the other is "Most qualified." "Fully qualified," believe it or not, and this is one of the peculiarities of the English language, is a lower requirement than "Most qualified."

An officer who has met certain time requirements in the Army is fully qualified for a promotion to the next higher rank and will, on the bais of his serial number, be promoted when the T.O. permits. However, when they need the best available people they use the concept of a most qualified officer as reflected by whatever those qualifications may be.

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I would say if the Correction Department is content to at random assign to the role of sergeant anybody who barely meets the qualifications, the pool concept would operate. If, on the other hand, it is interested in getting the people who know most about the things that they need to know about, the ranking concept, while not perfect, is much more desirable.

THE COURT: I think Mr. Baller asked something beyond that. I think he asked -- now that you discussed the differences between fully qualified and most qualified -- whether you believe that the content validation approach is more effective, I guess --

Is that right?

MR. BALLER: That is correct.

THE COURT: -- with regard to choosing for a pool or whether it is more effective for choosing for ranking or whether it is not more effective for either.

THE WITNESS: I think that's what my last sentence was intended to reply to. In terms of the productivity and effectiveness of those appointed, assuming that more people are eligible than will be appointed, any valid selection instrument, whether it is criterion validated or job related, will provide better quality personnel if used

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in a ranking method than just throwing everybody in a pool and pulling names out of a hat.

Q Doctor, you stated that in your position you couldn't have an opinion as to whether in fact the correction sergeant promotion exam was content valid.

My question is, if you had the assignment to make that determination, what kind of a procedure would you use and how long would it take?

A I wouldn't accept the assignment because it would be impractical at my age to become a subject matter specialist in the field -- in the duties, responsibilities, desirable attributes of prison reform officers. I can only do it as a psychologist using special subject matter specialists, which I think is different from what you are implying in your question.

If you are asking how long would it take for me to become competent, a matter of years.

Q Is it your testimony, then, that using your skills as a psychologist and a knowledge of job characteristics gained through your professional career that you could not, upon some amount of review of the job, make a substantive determination as to content validity of a test like that?

A I so testify.

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THE COURT: I take it, then, you put it that way, Doctor, so you are not being unduly modest, that you feel anybody with the skills and experience that you have had would in all good faith have to make the same answer?

THE WITNESS: Yes, if he were to be not unduly immodest.

Q You have also testified regarding the test development process for examination 34944, again as I understand it, in a somewhat hypothetical context.

Is it correct to state that one of the crucial steps of this process is defining the specific purpose of the examination to be given?

A Well, I think that would be belaboring the obvious.

Q Would it be correct also, and forgive me if as a layman I am grasping at the obvious, would it be correct also to say that one such purpose might be to predict who would develop into the best correction sergeant, another such purpose might be to predict who would be qualified for further promotion above sergeant's rank, and the third such purpose would be to predict who would be the best sergeant the day he was appointed after the examination.

A To the best of my knowledge, the answer to all of those questions would be no.

As I understand it, the sole purpose, the cause celebre, if you will, for creating an exam was because

an eligible list had expired, inadequate personnel were filling positions provisionally and there was a need to establish a new eligible register from which permanent appointments could legally be made. Beyond that, I know of no purpose for which -- I would say I have arrived at the conclusion if it were not for this need, if this need did not exist, neither would these exams.

Q Is it your testimony, then, that the basic purpose of this examination was to find the people who to the greatest degree possible, as measured on the examination, had the knowledge and skills and abilities to actually perform the job of sergeant at the time they took the exam?

A Those knowledges, skills and abilities measured by these tests with the assumption that they are the knowledges, skills -- some of the knowledges, skills and abilities required by correctional sergeants.

Q Do you actually know if the test constructors regarded their purpose in that same way?

A No. What I have just said is inferential.

Q On what do you base your inference?

A On the obvious need for such a test.

THE COURT: I don't see what difference it makes on what basis. As long as I know the assumptions on which Dr. Taylor is proceeding, it doesn't make any difference

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what the reason for the assumption is.

Q Dr. Taylor, let me represent to you -- obviously you don't know whether this is a correct representation or not, but I think the record will reflect it -- that in the best way that I could in my limited understanding of your field I posed the question of the purpose of the examination to Sam Taylor, who was one of the two principal officers responsible for its development, and I believe I asked him whether he was trying to predict who would be a good sergeant or who knew the most about what a sergeant does, being a good sergeant at that time. I believe that's an honest representation of my question.

His answer was he was looking for a predictor of who would be a good sergeant.

Is that inconsistent with your testimony about what the proper purpose should be?

A It is not inconsistent. I am not sure in what sense Mr. Taylor was using the term "predictor." But there is no reason to believe that a test once constructed cannot only be used -- a test, particularly of this type, is a sort of janus looking in two directions. It can one and the same time be a predictor, possibly, and may or may not be valid as such of future promotions of performance at higher rank. This would be a serendipinous finding.

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By the same token, it could also legitimately constitute a criterion to be predicted by entry level exams. So once it's there it has some byproducts that have nothing to do with the original purpose for its having been developed but which, since they are useful byproducts, serve a realistic purpose.

There is no contradiction, I don't think, between your representation of what Mr. Taylor said that such by-products exist and my assumption as to the raison d'etre of the test.

Q I don't believe your answer is completely responsive. I believe you told me that you knew quite clearly what the single purpose of the test, not excluding the possibility of other purposes as well, you knew what the single principal purpose was, and in my own poor fashion I tried to ask Mr. Taylor and Mrs. Greenberg attempted to ask Mr. Siegal what in their views the single purpose was.

Again without asking you to know whether or not our characterization of the testimony is correct, I believe the record will reflect that their answer indicated a principal purpose which was inconsistent with the principal purpose you have stated.

Now, this is all hypothetical from your point of view, obviously.

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My question is, if in fact they had a different view of what the principal purpose was, would that undercut your confidence in them as adequate test construction experts?

A No, not necessarily.

MRS. GORDON: Your Honor, if counsel is referring to Mr. Siegal, for example, and his testimony the other day in this court, I think I have a substantially different recollection of what Mr. Siegal said.

THE COURT: Let me say obviously any such discussion depends on the record itself. If the record doesn't bear out Mr. Baller's assumption, that is the end of that.

MR. BALLER: Right. I will leave it to the record.

Q You have also stated that you don't have any basis for knowing whether the subject matter specialists were sufficiently or adequately qualified in this particular case. I would like to ask you about the subject matter specialist as a procedural matter, as a matter of professional practice.

Is it necessary that such specialists work together with qualified test construction personnel to find the scope of the examination?

A I believe so. It is at least desirable.

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Q And also to create the items that constitute the various sub tests?

A I can see a highly artificial situation where they function independently, but I think it would be a highly inefficient way to proceed. It's a shirtsleeve job to sit down for a subject matter specialist in test construction and one or more subject matter specialists in a given field, to sit down and design, outline and create a viable test.

Now, why they should not cooperate or the fact that it could conceivably be done at arms' length just seems to me a procedural matter and a better device would come out of a cooperative effort rather than an independent one.

Q Do you have any way of knowing whether the subject matter specialists worked together with the test construction personnel in defining the scope of this examination?

THE COURT: I assume you don't have any first-hand knowledge.

THE WITNESS: I don't have any firsthand knowledge.

Q Were you here this morning when Mr. Sperbeck testified he was the first subject matter specialist called in?

A No.

MRS. GORDON: I am sorry, your Honor. The record

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does not reflect that in this case at all.

THE COURT: I don't recall what it reflects. Again, Mrs. Gordon, it depends on what it reflects. If you are right, you are right. If Mr. Baller is right, he is right.

In any event, the witness wasn't here to hear the testimony and it is irrelevant. I don't recall these fine points even though I now have 87 pages of notes.

MR. BALLER: Again, the record will show whatever it shows. My recollection is Mr. Sperbeck said --

THE COURT: I don't think it is desirable to discuss it.

Q You said that Defendants' Exhibit E, the job audit, would be proper material for use in revising the class specifications such as Plaintiffs' Exhibit 4. I take it you don't know whether in fact Plaintiffs' Exhibit 4 was revised in light of Defendants' Exhibit E, do you --

A No.

Q -- in the two years between the documents?

A No, I do not.

Q Would you consider it proper to do a job audit such as Defendants' Exhibit E, which you testified is a very extensive job audit, and not make any revisions in the class specifications of the job?

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A Conceivably.

THE COURT: It would depend on what you found out in the job audit, wouldn't it?

THE WITNESS: Yes.

Q If you found out the job was the same as it had been at the time, then you wouldn't change the specs, is that correct?

A I think I would be, again, more dependent upon the subject matter specialist as adviser as to whether the specs should be changed than going on my own.

Q Did you say under questioning by Mrs. Gordon that the use of Defendants' Exhibit E, the job audit, would be one of the necessary steps in developing a job related test?

A Some such collection and boiling down of the raw data collected during the course of these visits to institutions and perhaps even a further condensation since within these reports there is a great deal of redundancy.

Q Do you have Plaintiffs' Exhibit 10 in front of you still?

MR. BALLER: It's the summary of the procedures that Dr. Taylor is relying on. It is a memorandum, I believe.

Q Does that exhibit anywhere say how the job audit was used, if at all, in the test development process?

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THE COURT: I don't see why we should ask Dr. Taylor that question. Can't we read it ourselves and find out? If you want to ask him if he has found anything which suggests --

MR. BALLER: He did testify he is relying exclusively on this memorandum as the source of his knowledge of what happened.

MRS. GORDON: Excuse me. I think we already established that he had read the K, S and A's --

THE COURT: I didn't understand him to say he was relying on this memorandum exclusively as his knowledge of what had happened. His knowledge perhaps -- well, he doesn't even claim to have knowledge of what happened through this. He relied on a hypothetical question put to him by Mrs. Gordon which was: if you used the job analysis, and so on.

MR. BALLER: That is correct.

THE COURT: So I don't think he is responsible to have found from the document that the job analysis or, rather, that the job audit was used. You needn't answer the question, Doctor.

Q Can you have or create a content valid test without having an adequate job description for the purpose of the test construction?

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A Could counsel define the term "adequate" for me? The answer is self-serving in that if the job description is inadequate it answers itself. If it's adequate, it answers itself.

Q You need some job description in order to construct a content valid test, then, is that correct?

A Do you mean by that a long, formal document?

Q Doctor, I am not going to try to define job description to you. I think that is within your field and if you would like to define what kind of a job description it is that one must have in order to construct a content valid test, that is the point of my question.

A In essence, then, I would say that the greater the competence of the subject matter specialist, the greater his knowledge of the job, the less the need for formalized job description;

I think in all instances job information systematically collected is desirable. With highly competent subject matter specialists, a quite viable job related series of tests could be constructed with a minimum of formal job descriptions.

Q Did you also testify that with respect to the report preparation and supervision sub tests the subject matter specialists, as you understand that term, were not

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the Corrections Department people but the other individuals? Who were the subject matter specialists, as you understand it, for the report preparation and supervision sub tests?

A As I understand it, in those two areas, supervision and report writing, the subject matter specialists were personnel on the Civil Service staff rather than the correction institution staff.

Q And you are familiar with the EEOC guidelines?

A I have so stipulated.

Q I gather you have some problems with them. Do the guidelines as you understand them say that you have to have a job description in order to content validate a test?

A I think --

MRS. GORDON: Your Honor, I think they speak for themselves.

MR. BALLER: It is to lay a foundation for a question. I believe they do.

THE COURT: Why don't you say they do if they do?

MR. BALLER: All right.

Q Assuming that they do in section 1607.5(a), do you agree or disagree with that particular provision of the guidelines? Do you think that states appropriate professional views?

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MRS. GORDON: Maybe counsel should read the particular section.

MR. BALLER: You have my copy.

THE COURT: What exhibit number is it, please?

MR. BALLER: Plaintiffs' Exhibit 27.

THE COURT: Wait just a moment until I find it.

Q It says:

"Evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content in the case of job knowledge or proficiency tests and other things not relevant."

THE COURT: I don't see where that is.

MR. BALLER: It is in the middle of the paragraph numbered (a), 1607.5(a).

THE COURT: Yes, I see it.

A Another one of the very vague, nebulous, mother, God and country statements in the guidelines. If someone will define for me what EEOC means by "sufficient information" from job analyses to demonstrate the relevance of the contents and to whom, I can answer the question, but I do not know what EEOC means when they say "sufficient evidence."

THE COURT: Doctor, didn't you say you spent a

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A Our co-workers.

Q At Stevens?

A New York University.

Q When did that occur?

A About 1965 we started on a two-year program.

THE COURT: Your study showed that sometimes it turned out that a test showed that a man would do poorly on the job, let's say, when he had done poorly on the test and other times it didn't?

THE WITNESS: Also it showed that sometimes the blacks who scored lower as a group also performed more poorly as a group. Sometimes when blacks scored poorly as a group they did just as well on the job. The test might be valid for one group and not so valid for another group. It is a variable situation.

THE COURT: In other words, you weren't able to pin down the connection between performance on the test and performance on the job?

A That's right.

Q Can you give us an idea what types of jobs were involved in those studies?

A Office workers, nurses, trainees in a training program for disadvantaged in New York City.

Q Were you able to determine in the case of

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lot of time in Washington.

THE WITNESS: Yes.

THE COURT: And you still don't understand this language?

THE WITNESS: The more time I spend in Washington, your Honor, the more confused I become. I have no basis on which to outguess the EEOC on what they mean by "sufficient evidence."

Q Is it your testimony that as written, in your view vaguely, that that is not a proper professional statement?

A I beg your pardon?

Q Is it your testimony that as written it is not a proper professional statement?

A I don't know what you mean by "a proper professional statement." It is certainly not a definitive statement.

Q Do you agree or disagree with the statement as written?

A I don't understand the statement as written. It is not definitive.

Q You testified earlier about the meaning of "feasibility" as it is or is not defined in the guidelines. I believe your discussion centered around the term N, that is, the size of the population involved.

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Does "feasibility" in your view relate to other factors aside from the size of the population involved?

THE COURT: Let me ask whether you are asking the doctor whether his --

MR. BALLER: His own view, not the guideline.

THE COURT: What a proper definition of "feasibility" in this context is?

MRS. GREENBERG: I would like to request the court to request Mrs. Gordon not to shake her head.

THE COURT: I did once.

MRS. GORDON: I beg your pardon.

THE COURT: You are being asked for your view.

I also assume Dr. Taylor has sufficient professional pride he won't be influenced by the mannerisms of anybody in the court, the judge included.

A . There are a number of other factors which would render -- in any given situation which would render a criterion based validity study unfeasible, in my opinion.

Q What are some of them?

A Some of them are the unavailability or the impossibility, impracticability of designing a viable criterion. As a matter of fact, this may be a more important facet of unfeasibility than the size of the sample. I have devoted much of my career and have many publications in

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the field of criterion development. I have never succeeded nor do I know of anyone else who has succeeded in the design and selection of a truly sound, unbiased, independent, uncontaminated criterion which would yield anything but a gross underestimate of the validity of a selection device. As a matter of fact, in most of the criterion related studies that are conducted and reported in the literature it is a moot point whether the low relationship stems from the inadequacy of the predictors or the incompetence of the criterion, and I think in at least an equal number of cases it is the criterion rather than the predictor that is at fault.

Q You stated that as far as you are concerned a hundred is about the borderline for a proper N. Have you never done an empirical predictive validation study with an N less than a hundred?

THE COURT: What is N?

MR. BALLER: Number of people involved, basically, in the job.

A I have done a large number of validation studies with samples of less than a hundred. That does not mean that I do not wish I had a hundred. It does mean that as a practitioner I work within the limits of reality. As a theoretician I know when I am compromising and the extent

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of that compromise.

Q In your opinion, do the EEOC guidelines state proper standards which are properly applicable to civil service testing procedures as you know them generally?

A I believe I answered that question this morning.

Q I must have missed it. Would you please repeat your answer?

A Since the guidelines were published in August, 1970, in their present form and since civil service jurisdictions were not under EEOC jurisdiction or subject to Title 7 of the Civil Rights Act of 1964 until it was amended in 1972, it is highly probable that the guidelines were not prepared with the special problems and requirements of civil service selection in mind at the time.

Q If I may interrupt you, I understand that. History reflects that. The question is what do you think. Are they properly applicable?

A I don't think they are properly applicable to anybody under all circumstances.

Q Do you feel, in the context of civil service employment and selection systems, predictive validation techniques are preferable ot inferior to content validation techniques?

A It depends upon the purpose. In some cases,

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predictive techniques are more desirable than content, in other cases the reverse is true.

Q What are the factors that would make you lean one way or the other in civil service context?

A In most cases you would use a combination of the two. You would normally employ a predictive validation in a situation in which you did not anticipate or expect that the individual applicants would at the time of their appointment have certain measurable skills, techniques, abilities and knowledges which were immediately applicable to the job. In those cases you would use measures of those skills, knowledges, etc. rather than some vague predictors of them.

On the other hand, where such knowledges were prerequisite to the job, the use of measures of those skills and the existence of those skills would be more appropriate to the situation, more necessary.

Q Are you able to give us any opinion as to whether or not a predictor or empirical validation study of examination 34944 would be possible at this time, or feasible, if you prefer?

A What would you be validating -- the criterion or the test?

Q Validate the test. Do you know, based on your

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knowledge of the job and the circumstances, whether or not it could be done?

A I could answer the question only in general without specific reference to this test.

Q Then I think you have answered the question.

Can you answer whether it would be desirable to do a predictive or empirical validation of that test?

A It would be desirable as a research exercise to see if a criterion could be constructed that was as good a measure as the test of what the test purports to measure.

Q You testified that you would assume the sergeants job includes elements beyond the scope of the five sub test examination fields. What are some of the other elements you would assume are in that job?

A Specifically, I don't know, but I do know that no selection procedure for any job can be so comprehensive that it attempts to predict every element and aspect of any job.

Q Do you have any basis for knowing whether some of those other elements might be more important or more representative of the job than the elements which are in the five sub tests?

A No.

Q You stated that even if you had competent subject

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matter experts, competent test construction experts and an adequate procedure, you might not come out with a good result in terms of a content valid examination.

Do you have any basis for judging whether this examination was a good result?

A It's a good examination.

THE COURT: I really think the doctor made himself clear on that point, that he judges the test to be a good test of what it purports to test but he does not suggest that he judges the merit of the contents with regard to the purpose of an examination for a sergeant's job.

Is that right?

THE WITNESS: Exactly.

Q Your testimony that it was a good test of what it purports to test as I understand it is based only on your review of the item analysis and not on a substantive review of the questions as they relate to the job, is that correct?

A The substantive content of the questions has nothing whatsoever to do except as they are reflected in the job analysis with the merits of the test as a measuring instrument.

Q You are saying that the --

A I am saying I could have made just as valid a

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judgment upon the competence of these tests as measuring devices without ever having seen the items, and seeing the items contributed nothing to my judgment nor could they to the judgment of any other qualified test expert looking at the item analysis.

Q Would a review of the test items not contribute anything to the judgment of the court, to a person who is not a test expert?

MRS. GORDON: Objection.

A I think they would be detrimental because a non-test expert would be disposed to look for evidence of face validity and raise common sense but invalid questions with respect to specific items or specific words which would only obfuscate the issue.

Q In regard to the item analysis, you testified that for every item you reviewed the keyed response was selected by a higher proportion of the high performers than of the low performers. I assume you mean by that, and this is my question, the high performers on the test and the low performers on the test, not the high or low performers on the job.

A You have no measures of high or low performers on the job. I am only talking to the test as a measuring device.

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Q You also said that your comment that the test was well constructed [illegible] -- it might mean it was a good test for blacks [illegible] whites, and I would assume Hispanics --

A I can make no assumption about Hispanics. There were only fifteen.

Q Blacks and whites. If it is good for blacks it is good for whites in your view because it is well constructed?

A That is what the data suggests.

Q Would the data also support a conclusion that if the test is bad for whites, in other words, not job related for whites, it is not job related for blacks?

A I was not talking to -- there was nothing in my reply that referred to job relatedness, only to the quality of the test as a test.

Q Let me just clarify one thing. Is it your testimony that the item analysis only shows that the test measures, what it purports, that the test measures something rather than the test measures what it purports to measure?

A It depends on how you are using the word "purports." What I suppose, reduced to lay terms, I am saying is that the items which we call 486-EO, 485-EO, for example CE-1, 2 or 3 are a consistent constellation of items which are yielding a dispersion of validities in that subject matter area to which they refer.

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Q Let me just see if I can understand that and put it in lay terms.

If the five sub tests were well constructed and they referred to reading, writing, arithmetic, baseball and international relations, you could have an ethnic -- rather, an item analysis, not referring to an ethnic item analysis, but you could have an item analysis purporting consistent results which would indicate that was a good test of those subjects and it would look like this item analysis?

A No. As I said at the outset of my testimony, Counselor, for the purpose of my testimony each section of this test was to be considered a separate instrument testing each separate subject matter area and each item analysis was a separate and distinct item analysis standing on its own feet.

I then even contrasted, if you will recall, the differences between the five tests as contrasted with the racial differences between the means within the five tests.

Q Can you tell from the item analysis or your review of the item analysis what is being measured on the test, what substantively is being measured?

A Not if you look only at the item analysis.

MR. BALLER: No further questions.

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THE COURT: Anything further?

MRS. GORDON: No questions, your Honor.

THE COURT: Thank you, Dr. Taylor. I enjoyed your testimony.

(Witness excused.)

THE COURT: Ladies and gentlemen, I wish you all a very good weekend. I will see you, with the exception of Mrs. Greenberg, at 10:00 o'clock, Monday morning. If you are here at 10:00, you may have to wait a few minutes because we have a plea to take, but I don't think it will take very long.

(Adjourned to 10:00 A.M., Monday, July 30, 1973.)

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EDWARD L. KIRKLAND, etc.

Plaintiffs,

-against- 73 Civil 1548

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, etc.,

Defendants.

New York, New York
July 30, 1973
10:30 A.M.

(In open court.)

THE COURT: Mrs. Gordon, I think we are ready. I would like to return to you some exhibits of yours I have here.

(Discussion off the record.

MRS. GORDON: Your Honor, just to conclude on defendants' case, I would like to read off the list of exhibits, I believe most of them already in the record but perhaps there are a few not in the record at this point.

Defendants' Exhibit -- I will just read the list, your Honor.

THE COURT: I don't quite understand. You are offering them in evidence at this time, you mean?

MRS. GORDON: I would like to read through the whole series. Most of it is already in evidence. There are a few other items that have not yet been placed in

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evidence that I want to place in evidence at this point.

THE COURT: I see no need to read the list in the record. Anything that hasn't been admitted, you can offer at this time.

MRS. GORDON: Fine, your Honor.

THE COURT: Does Mr. Baller have a copy of the list?

MRS. GORDON: Yes.

THE COURT: The quickest way to do this, I believe, would be to have him indicate if he has any objection to any exhibit on that list being admitted in evidence. And if he doesn't, I will just take it they are all admitted.

MRS. GORDON: Just so we keep the record a little bit smaller, there are a few we don't want to offer. So it makes it a little more complicated.

Mr. Baller, there are a couple you don't have that I have as in: M, N and O. We would like to offer Defendants' Exhibit U -- excuse me -- Defendants' Exhibit T, which is a diagram of Greenhaven Correctional Facility showing sergeant assignments.

MR. KANTOR: It is in evidence.

MRS. GORDON: Defendants' Exhibits T and U, I want to be sure they are in the record, your Honor. One is Greenhaven Facility with the sergeants' roster, and the

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other one, Defendants' Exhibit U, is in the record.

THE COURT: Mrs. Gordon, I would rather not waste precious witness time for those mechanics. Certainly the two of you can figure out whether anything is in evidence by looking at the document, and if it is not and there is no objection, I will admit it; and if it is not and there is objection, I will hear it. Will you crystallize it during the luncheon hour or the break?

MRS. GORDON: Yes, your Honor.

I did want to ask whether or not we could have the deposition of Deputy Superintendent Ryder admitted into evidence. I don't say that his statements were inconsistent on the stand with the deposition. I do not offer it for that purpose. I think it would amplify the situation and serve the convenience of myself and, indeed, of Mr. Baller if we could conveniently refer to it.

THE COURT: Mr. Baller?

MR. BALLER: No objection.

THE COURT: It is received in evidence.

(Defendants' Exhibit FF was received in evidence.)

THE COURT: Defendants' Exhibit FF, the pretrial deposition of Mr. Ryder, is received in evidence.

MRS. GORDON: I would also like the same arrangement

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with respect to the depositions of Kirkland and Hayes.

Is that all right, Mr. Baller?

MR. BALLER: No, I don't see any reason to put those in.

THE COURT: I can't either.

MR. BALLER: Many of the issues covered on the deposition relate to the Brotherhood.

MRS. GORDON: We don't offer them for the purposes of the Brotherhood. They do amplify the nature of the duties that the two individuals had at Ossining and Mr. Hayes at the academy.

THE COURT: Over Mr. Baller's objection I am not inclined to receive them, unless there is something inconsistent you want to bring to my attention.

MRS. GORDON: May we have permission after the conclusion of the hearing to take a look through those depositions in more detail to see if there is something we wish to offer as an inconsistent statement?

Your Honor, I withdraw it. It is not breathtaking.

THE COURT: I don't want to sigh and moan about it. It is just that I have a million things to do and I would like to get these things cleanly concluded.

MRS. GORDON: We withdraw the request, your Honor.

Then subject to the discussion with Mr. Baller

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and final determination about the exhibits going into evidence, you rest, is that correct?

MRS. GORDON: That's correct.

THE COURT: Mr. Baller.

MR. BALLER: I call Dr. Richard Barrett as a witness.

R I C H A R D S. B A R R E T T, called as a witness by the plaintiffs, being first duly sworn, testified as follows;

DIRECT EXAMINATION

BY MR. BALLER:

Q Dr. Barrett, I show you a document which has been marked for identification by the clerk as Plaintiffs' Exhibit 24. Is that your vitae?

A Yes, it is.

THE COURT: What exhibit number?

MR. BALLER: 24.

I move the admission of that document into evidence in order to save time.

MRS. GORDON: No objection, your Honor.

(Plaintiffs' Exhibit 24 was received in evidence.)

THE COURT: Do you want to ask any questions of the doctor with regard to his qualifications?

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MR. BALLER: I have a few brief questions.

MRS. GORDON: It depends on what he is being qualified for, your Honor.

MR. BALLER: I have a few questions regarding his qualifications. I will not cover most of the material in that document.

Q Dr. Barrett, what is your current employment?

A I am employed at Stevens Institute of Technology where I am a professor of management sciences. I am also the director of the division of applied psychology in the department of management science, and I am a director of the laboratory of psychological studies.

Q Do you do consulting with various clients as part of this work?

A Yes.

Q Would you give us a very brief idea of some of the types of clients you consult with at the current time?

A There has been an ongoing relationship with a number of communities in northern New Jersey in which our staff has appraised candidates for promotion in the police departments from the point of view of how they might react to emotional stress, any sexual problems they might have, their reactions regarding hostility, and so forth. We then write a report to the community about one or more candidates

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that they have sent us and they make their decision based in part on what we have written.

THE COURT: Dr. Barrett, when you say "we," to whom do you refer?

THE WITNESS: The staff working under me. I don't do that work.

Q I take it from your vitae you have in the past been consulted by a number of private organizations.

A We have other activities at Stevens that I think are relevant. We are negotiating with the Pennsylvania State Police Department to develop a validated selection procedure partially because of their concern of its being fair as well as valid.

We are also working with Public Service Gas and Electric in New Jersey on an ongoing project to develop fair and valid tests for many of the journeymen level jobs.

Q In your work at present and in the past, have you been particularly involved in the equal opportunity employment aspects of testing and test validation and employee selection?

A Yes, I have.

Q Have you been an expert witness in other EEOC cases involving these subjects?

A Yes, I have.

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Q I show you a document marked for identification as Plaintiffs' Exhibit 25. Is that a list of the cases in which you have been involved as an expert witness?

A Yes. It does not include the latest case, which is against the Arkansas Power and Light Company. The name of the plaintiff escapes me at the moment.

THE COURT: What do you do in your spare time, Doctor?

THE WITNESS: Swim.

Q Are there any cases on this list you would particularly like to draw the judge's attention to?

A Griggs versus Duke Power, Chance versus Board of Examiners; U. S. versus Jacksonville Terminal; Castro versus Beecher; Commonwealth of Pennsylvania versus O'Neil; Bridgeport Guardians versus Bridgeport Civil Service Commission.

THE COURT: I get the point.

MR. BALLER: I move the admission of this into evidence again to shorten Dr. Barrett's testimony.

MRS. GORDON: I have no objection.

(Plaintiffs' Exhibit 25 was received in evidence.)

Q In your work relating to equal employment opportunity litigation, have you always worked on the side of the plaintiffs or the aggrieved party?

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A No, I have not.

Q Can you tell us some of the clients whom you have represented who were defendants or respondents in such litigation?

A I haven't worked with defendants or respondents in litigation, no. I have worked as a consultant.

In addition to the Pennsylvania State Police and Philadelphia -- the Public Service Gas and Electric Company, with the National League for Nursing to develop a plan for developing a set of fair and valid tests for nurses.

I have been a consultant to the U. S. Civil Service Commission, the Equal Employment Opportunity Commission on developing standards for fair employment testing, and I have consulted with the EEOC and the New York City Commission on Human Rights and the Department of Justice in other matters.

Q Have there been occasions, Dr. Barrett --

THE COURT: Let me get that. The implication in Mr. Baller's question was that you might have served as a consultant or expert witness, as you now are doing, for defendants in cases such as this, but I gather that is not correct.

THE WITNESS: No, that is not correct.

THE COURT: In all the litigation in which you have participated you have represented -- not represented

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but you have been a consultant to or an expert witness for the plaintiffs, is that correct?

THE WITNESS: That's correct.

THE COURT: O.K.

Q In that regard, Dr. Barrett, are there occasions when you have been consulted by law enforcement agencies or aggrieved parties with regard to the testing and selection procedures involved in potential litigation in which you concluded that those procedures were valid?

A Yes.

Q I understand that for ethical reasons you can't tell us which testing programs were involved, but could you please tell us which agencies consulted you on these occasions?

A The Department of Justice and the New York City Commission on Human Rights.

Q What documents embody the generally recognized standards of your profession, Dr. Barrett?

A There is the Standards of the American Psychological Association for tests and manuals, there are the EEOC guidelines, there are also less official documents, the most prominent among which is the mental measurements year books, of which there are now seven in the series, and, of course, journals and texts.

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Q Have you participated in formulating or developing any of these standards yourself?

A I have made written and sometimes oral comment regarding the U. S. Civil Service Commission's regulations, the proposed revisions to the EEOC guidelines and the proposed revisions to the American Psychological Association standards.

Q Are you familiar with the facts of this case, Dr. Barrett?

A Yes, I am.

Q What is the basis of your familiarity?

A Well, I early had some discussion with the attorneys for the Legal Defense Fund, I read numerous documents, I was then deposed by the attorneys for the state.

After that I deferred the reading of documents and I spent a day at the correctional facility at Greenhaven and I attended court Wednesday, Thursday and Friday of last week.

Q Could you indicate briefly to the court which documents of record in this litigation you have read?

A I have read test 34944, I have read the plaintiffs' interrogatories and two sets of answers thereto, depositions by Samuel Taylor and Gerard Ryder, I have looked at so-called scatter diagram of test scores by facility,

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summary of ethnic data, numerous other documents, including Defendants' Exhibit E and Defendants' Exhibit DD and including the K, S and A's and the job statement for the correction sergeant.

Q In addition to your attendance at court Wednesday, Thursday and Friday of last week, did you read the transcript of Mr. Taylor's testimony from Tuesday afternoon?

A Yes.

Q When you visited Greenhaven Prison -- by the way, when was that?

A It was the 20th of July.

Q Were you able to speak to correction sergeants there?

A Yes, I talked to eight sergeants.

Q How long did you spend inside the prison?

A About five hours.

MR. BALLER: Your Honor, I move Dr. Barrett's qualification as an expert witness in the field of employee selection, instruments, tests and validation of tests both for the purpose of commenting generally and for the purpose of commenting from his expert standpoint on the facts of this case as he has been able to become familiar with them.

THE COURT: I am not quite sure I understand the

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distinction between all those things. In any event, Dr. Barrett has competence necessary to render opinions of a meaningful nature in this case.

MRS. GORDON: We don't question that, your Honor.

THE COURT: I didn't think you did.

Q Dr. Barrett, is it your opinion that the explanation of test validation principles which were given to the court during the past week have been entirely accurate?

A No, not entirely.

Q Would you please, as briefly as possible, indicate in what aspect those principles may not have been clearly conveyed to the court?

A One principle that I heard enunciated was that criterion related validity, content validity and construct validity are all of a piece and that for a test to be truly valid it has to be valid in all three senses.

It's my understanding of the field that the only thing that really counts is whether the test predicts success and a test that does not have content validity may very well predict success.

Also, tests that have content validity may not predict success on the job.

THE COURT: You are going too fast for me. You say that you understand that the only thing that counts is

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the prediction of success. That of course is the whole question here.

THE WITNESS: Right.

THE COURT: What do you mean when you say you understand that?

THE WITNESS: Well, it is my understanding of the definition of criterion related validity and the relationship of criterion related validity to content and construct validity.

I understand it to be independent of each other and not related to each other necessarily, although they may be.

THE COURT: Well, I understand that you differ from one of the witnesses in that regard, but it seems to me that is more philosophical than mechanical. I am glad to have that comment. I don't think it gets me really any farther, nor do I recall, maybe wrongly, that anybody said that a test couldn't be validated unless it was validated by all of the various possible methods of validation.

I think perhaps again philosophically somebody commented that you couldn't have complete validation in the sense that you could -- that since you cannot arrive at the truth, the philosophic truth about tests such as these and their validity, that the more kinds of validation

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that were applied the more likely you would be to come up with something that was valid. Without having studied the material, that is what I seem to have ingested on that point to date.

Q Dr. Barrett, I am going to ask you some questions regarding your evaluation of the evidence presented on the latest correction sergeant examination in this case.

Before I get to it, would it assist you in explaining your views on that particular subject if you could explain to the court the concept of criterion related validation as you view it?

A Perhaps the best thing to do would be to use a diagram. That might help.

THE COURT: I would be glad to have you do it.

A What I am drawing is called a scatter plot or correlation diagram. Along the horizontal axis we will have test scores running from low to high, and we will have some measure of performance running from poor performance to good.

Now, for each individual in our sample we can represent simultaneously his test score and his job performance by a single dot at the intersection of two lines representing perhaps the high score on the test and good performance represented by an A.

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THE COURT: By "past performance" you mean somebody who has been observing him on the job after he took the job?

THE WITNESS: Right, some measure of his job. Individual B may have been average in performance but very good on the test. Individual C may have been average on both, and so forth. And we begin to fill in thos whole diagram and if the test is valid we wind up with this upward trend to the right and, in general, those people who score higher on the test are the ones who do better on the job.

This is the simplest way of representing a test which has some level of criterion related validity.

Now, it's awkward and inconvenient to make such scatter plots, so it has been generally the custom to represent this sort of a plot by a single number which is called a correlation coefficient which runs from point one at the top through zero down to 1.0 in case there is a negative relationship.

If, however, this oval is not an oval but turns out to be a circle, then the test has no relationship with the job and the test is not thereby shown to have any criterion related validity.

BY MR. BALLER:

Q At what stage in the testing or test development

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procedure is the correlation between job performance and test scores calculated?

A It is calculated after the individuals have been on the job long enough so that a stable and reasonable measure of their work performance can be developed. The test may be given to them as they are applicants, in which case we call our study a predictive study since we are trying to predict their future performance. The test may be given at the same time that the criterion is developed, in which case it is called a concurrent study.

THE COURT: I understand you can give the test at any time, but how can you evaluate the performance of somebody before actually taking the job?

THE WITNESS: I intend to indicate that the performance rating is taken after they have been on the job long enough so that their performance is stable and measurable.

THE COURT: I see. You mean regardless of whether the test was taken before they actually started the job --

THE WITNESS: That's right.

THE COURT: I see. All right.

Q Are both of those procedures, that is, the predictive or I believe it's called the concurrent validation, acceptable criterion related validation techniques?

A They are acceptable but the predictive study is

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more acceptable than the concurrent study for a number of reasons, one of which is that the people who are taking the test in the predictive study are truly motivated as candidates are motivated. People who are taking part in a concurrent study may not be highly motivated.

THE COURT: Suppose they are provisional.

THE WITNESS: They may then be very highly motivated.

Also, in the concurrent study we have serious sampling problems. We don't have anybody on the job who wasn't hired, nor do we have people who have been fired or who quit or who decided they would be better off working some place else at a better job or who had been promoted out of this pool. So the concurrent study is hard to interpret compared to a predictive study.

Q Would you please define for the court content validity or content validation procedures as you see them?

A A test is content valid if it is a sample of the work done or if it is a direct measure of essential knowledge that is required to perform a job. The classic example of content validity that's always given is that of the typing test for the person whose job is primarily typing.

We also include in content validity essential

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knowledge which we may test in a pencil and paper sense such as knowledge of bookkeeping, knowledge of the law, knowledge of medicine.

Wherever a person is supposed to come to the job with some specific training, we say the test has content validity if it is a good measure of how well the person has absorbed the training.

Q Would you please tell us in your opinion as briefly as possible how one should go about properly developing and validating a test to show it has predictive validity, and by "test" perhaps I ought to explain my question is directed at an employee selection procedure which may or may not be a written examination?

A The first step is sort of a philosophical kind of step.

THE COURT: That is predictive validity?

THE WITNESS: Right.

THE COURT: That has nothing to do with content validity?

THE WITNESS: That is right.

A (Continued) That is to have a discussion in some depth with the policy makers and organization to try to get the best answer that is possible to the fundamental question of why we are having a selection procedure in the

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first place. The obvious answer is to get better people.

Then we must find out what we mean by better people, what kind of performance are we looking for. Are we looking for people who will stay a long time on the job? Are we looking for people who are readily trainable? Are we looking for people who will perform well on their initial job and we don't care about what they do after that? Are we looking for people with promotion potential?

Let me look into it in some more detail. There are lots of things people do on a job which don't contributed to success or failure on the job. Other things are more critical. We want to identify what things are critical. We would ask the question, for example, of what problems do you now see in your organization which you think we might be able to alleviate by a better selection procedure, or what are the successes and triumphs of your organization which you might be able to foster by getting people like those people who are performing well.

We then go on and analyze the job, and this analysis concerns talking with people on the job, if it is a job that can be observed well, observing them on the job, talking to supervisors, talking to other experts in the field, reading literature until one becomes satisfied that he knows the job well enough to develop a selection pro-

cedure.

He then uses this information in two directions, one of which is to develop the selection procedures. He may decide to use or to buy tests, he may decide to score an application blank as if it were a test, he may use the interview, he may check references, in some cases they measure educational background, and so forth and so on.

Putting together what we could call a selection battery, a number of things which might go into the decision, not just tests.

On the other hand, you will use the same information from the job analysis to develop the criterion, which is the performance on the job which we are trying to predict. Sometimes this is done I think rather carelessly and not effectively. They may simply ask individuals to rank all the people under their direction and convert these ranks mathematically to a score which they can use.

Developing the criterion is a very difficult process. One of the oldtimers in the field says it takes 75 per cent of the work, and I don't think anybody can prove he was wrong. It takes a long time because it is not only necessary to determine what is good performance, we must then get some measure of it, and if we are getting the measure from supervisors we must communicate to them what

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we want to know, why we want to know it. We have to train them to understand the rating procedure and motivate them to rate accurately.

Then if it's a predictive study, we have to hire some people and we have to wait for them to be trained and to be put on the job and then come back and compare this measure that we then take of their performance with their original test scores which we have stored away in our records until the time of the study.

We carry on from this point in at least two directions. One is that if we have a substantial minority group representation, we separate out the minority and the non-minority members and develop two such scatter plots and develop two criterion coefficients, and so forth, down the line.

The other step that has to be done is if the test is to be used with a passing score, it is necessary to establish that passing score on some rational basis. The idea of the passing score is that it should be set at a level where we begin to get so many potential failures and we are getting few potential successes, and we decide at this point it is economical and and wise to cut off people from further consideration. It may or may not have anything to do with the number of openings that are available. That

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is a separate issue.

THE COURT: Of course it is a separate issue, there is no doubt about that, but doesn't -- and you heard me talking with Dr. Taylor about my own experience with passing scores generally being in the academis setting where they have nothing to do with how many people are going to be wanted unless they are based on a curve, I suppose, but I don't understand why you say that a passing score must be set as you have suggested. I understand why it can be set and why there are arguments in its favor.

Why do you believe that is more required than the criterion that the state witness spoke about of deciding in rough numbers how many people you want and setting a passing level there?

THE WITNESS: I think, your Honor, I could show you on the diagram.

What I have pictured here, at least originally, is an oval with a positive trend to it. One of the situations that frequently exists in this world, we have the same problems, is that there are a number of skills, knowledges, and so forth, which are essention to the job up to a point, but beyond that point their possession does not help the incumbent.

Our graph instead of being an oval would look

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something like this in an exaggerated form, that is, if someone is to take a position as a French teacher, that person has to know French, but after the person knows enough French there are other attributes of a teacher that will lead to success and failure.

After we get above a cutoff score like this, success and failure depend very often on other attributes. It is not always the best student who becomes the best engineer. The best engineer is one who not only has the best knowledge of engineering but the drive, the curiosity, and so forth, to be successful.

So I think there is some rationale to qualifying tests in which we reject some people who are so deficient in something essential that they really don't have much chance of ever being successful, but accept into this pool all the people who have enough qualifications to be successful.

THE COURT: In that regard, there is a legend in the legal profession that A students become professors, the B students become the judges and the C students become the rich lawyers.

Q Dr. Barrett, in that explanation you specified that the first step was to define what the purpose of the selection is. Am I to understand that depending on what

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you determine the purpose to be the test or the selection procedure itself may vary?

A Yes, it would.

Q You have also noted that the problems and successes of the organization should be specified. Would you give us some kind of idea what that process would lead to in practical terms of what kind of a test would come out of it?

A Well, this kind of an examination might lead people to look, for example, at a training program. They have thought that what they wanted to do was to select people who would be successful if trained, but a close examination of the training program often shows everybody passes. If everybody passes, then that training program is not a very good criterion for success and they may really be concerned with success on the job rather than success in training.

Q If a study of particular problems of an organization shows some are particularly crucial to the organization's successful functioning, would it be possible to construct a test which focuses on those problems?

A Yes.

Q Would that comment also apply to a study which reveals that certain successful attributes of job performance are particularly important to the organization?

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A Yes.

Q How does the process you have just described differ from the process of developing a content valid test, as briefly as you can?

A Well, we go through all the initial stages of trying to decide what we want to do. We then develop the test but we do not develop criteria.

In order to determine whether the test is really content valid or not, we then go back and look at the process under which it was developed and we also look at the test itself and compare it with the job. And we are particularly concerned here in content validity to make sure that the test does not emphasize things that are trivial but easily measured as compared to things that are really important on the job that may be hard to measure.

There is an old tendency among test builders to build tests that are easy to build and often they miss the boat.

In addition, a test should always meet some technical requirements of excellence. These are determined by item analysis as was described before by determining the reliability of the test, the difficulty of the test, by weeding out items that are either too easy or too hard or which item analysis shows to be ambiguous.

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There is also a more complicated statistical maneuver one might engage in to get a clear picture of how a test is put together and whether it's content is parallel to the content of the job.

Q In the context of equal employment issues related to this field of testing and test development, could you explain what is meant by a test's fairness?

A A test is fair if the probability of a person's being hired or promoted is roughly equal to the probability of his being successful. It is unfair if the probability of his being hired or promoted is noticeably less than the probability of his being successful if he were on the job.

Q For us lay people, is it accurate to state a test is fair if it is job related as we understand that term?

A More is required than that.

THE COURT: I think I understand this comparison very well. That is, if a test is fair to the extent that the chances of a man -- I am repeating almost what you said but you can't put it better -- being hired or promoted are equal to those of his probably being successful if he takes the job, is that right?

THE WITNESS: That's right.

Q What is the relationship between fairness as you

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have just defined it and predictive validity?

A Let me revert once again to the blackboard.

Let's go back to this original model where I had the oval. If the dots representing minority and non-minority candidates are about equally scattered throughout this test, then the test is both fair and valid. If the oval does not describe it and it is more circular but still the dots representing the minority and non-minority candidates were equally scattered throughout it, it would be invalid but it would be fair.

No employer should use it because it is simply a waste of time but it does not have any consequences for minority candidates who might be taking the test.

Let us suppose when we separate out the blacks and whites we have a situation like this (writing). Here we have two ovals running diagonally from lower left to upper right. The whites do better on the test and also do better on the job. The blacks do more poorly on the test and more poorly on the job. This test is valid and it is fair even if it means fewer blacks are hired or promoted.

For example, if you happen to be taking the top half of the candidates, you should draw a line down through the middle of the entire distribution which shows we would get many more whites than blacks. You would also, however,

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be getting many more people who are above average in basic ability.

This conclusion of course is an accurate one if and only if we can really count on fairness and validity of the performance measure. If it happens that the minority candidates or people on the job are not given appropriate training, they are given poor assignments, they are harassed or they are simply rated down by their supervisors, you would get this result, but, however, it would be spurious and would not give us a clear picture of the relationship that existed.

Now suppose we have a situation in which the performance level of the blacks and the whites is about equal. The test is valid for both groups but the blacks do more poorly on the test. We have a situation like that.

THE COURT: Performance is equal but the blacks do more poorly on the test?

THE WITNESS: That's correct.

THE COURT: I take it that will be the claim here.

THE WITNESS: I don't know what the claim is. I don't know what the performance is or would be of the blacks. This is a hypothetical situation.

Now, what would happen here if we took the top half of all the candidates, we would get many more whites

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than blacks because they did better on the test, but we would get relatively more potentially poor performing whites than blacks and potentially high performance blacks would not be selected. The rational thing to do would be to have a cutoff running through the middle of the white distribution and a cutoff running through the middle of the black distribution or one could add a constant to the score from the blacks to make them come out equal to the whites.

I want to emphasize that although some people think this is giving an unfair advantage to the blacks that is not at all true because the only thing that tests are more and the only thing they are good for is predict performance on the job.

I should use rather than a test score a more cumbersome but more meaningful terminology, and that is the predicted job performance. We should be selecting people on the basis of predictive job performance. If the tests do not work the same for both groups, we predict the same job performance by different means. In this case, we would predict the same job performance by adding a constant to the score of the blacks but the job performance counts, not the test scores.

Another possible situation we have here is that the whites do better on the test than the blacks but the

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test is not valid for anybody, and that means that when we use any cutoff score, no matter where it may be, although we could adjust it so it is fair for both blacks and whites the test is not helping the Correction Department to get better employees or promote better sergeants. This is a situation which is probably the most to be avoided. The test is invalid and unfair, both.

Q I take it that all of your last few examples, Dr. Barrett, were all hypothetical?

A All hypothetical, yes.

Q Is it also correct that the ideal solution would be the one you recently erased, that is, having a valid test which predicted who would do the best job and then taking everyone who scored in that range?

A Validity and fairness, you mean?

Q Yes.

A Yes.

THE COURT: I take it the difference between fairness and validity as conceptual components of this examination is fairness is an attempt to reach some kind of ethical or moral standard and validity is a description of the extent to which that objective is achieved or forecast, I guess is a better way of putting it, by the test, is that right?

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THE WITNESS: Your Honor, I think I put it a little bit differently. The test is valid when the high scorers do better, and a test is fair when no one group is unlikely to be selected because of the test scores. They are separate entities here in that you can be fair and valid, fair and invalid, and so forth, all possible combinations can exist. They are separate, I would say, but interrelated concepts.

THE COURT: Are these concepts generally recognized in your profession as being the controlling concepts or are there various schools on the point or is it an original point of view of your own or what?

THE WITNESS: I think it's fairly well accepted, your Honor. I developed some diagrams some years ago for this purpose and an organization headed by a man who has testified on the other side has asked for copies of these diagrams to distribute to his clients. So I think it is accepted.

THE COURT: You certainly bring out your points clearly as a diagrammatic portrayal.

THE WITNESS: Thank you.

Q Before we pass to a consideration of the specific examination involved here, Dr. Barrett, and on this more general level, were there any comments contained in Dr.

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Taylor's testimony which you feel are material and with which you would like to take issue or clarify?

THE COURT: Was that Dr. Taylor, the expert witness?

MR. BALLER: That is correct.

A There are several points on which we differ considerably.

Number one, as I paraphrase what he said, he said that if a person needs to be fully functional when he first comes on the job, then content validity is appropriate. In my discussion with the sergeants at Greenhaven, I found and verified what I expected to be the common sense notion, that when a person is promoted from a journeyman level to a supervisory level he has a great deal to learn about the job.

The first person I interviewed had been a sergeant for only two days, although he had been a correction officer for some years, and we cut short the interview because he was simply unable to answer a great many of the questions about the job.

So I think it's not correct to say that it's expected a sergeant will be functioning fully when he first arrives on the job.

Another point is that Dr. Taylor said that the tests had inherent validity, and this is a concept which I

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reject and which I think most of the people in the field reject. It depends on stating that the test is valid almost because I say one. One of the former presidents of Division 14 in his presidential address called that validity by proclamation, and this I don't accept.

Also, Dr. Taylor said it would take ten years on a job for a person to know enough about it to be able to state whether or not the test was content valid. I don't think that's true. The longest job analysis I ever heard of in this general area was one that took six months with a team of people, but they were doing a research study, they were not doing a straight validation study. And I think one could learn enough about the job in a fairly short time to make some sensible statements about the content validity of the test.

Q Let me ask you, have you in your work advised employes and organizations about selecting people for promotion to supervisory jobs?

A Have I? Yes.

Q In your experience, is it desirable or do you find it desirable to expect people being promoted into supervisory jobs for the first time to know how to perform them at the time they are promoted?

A No, generally they have to have a break-in period.

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Sometimes there is formal training. Many organizations have special schools for people who are supervisors.

Q Turning to examination 34944, I would like --

THE COURT: Since you are starting on a new subject, it is about time for a mid-morning recess. We will take a short recess.

(Recess.)

DIRECT EXAMINATION (CONTINUED)

BY MR. BALLER:

Q Dr. Barrett, based on your examination of documents of record in this case and your attendance at trial and your study of materials which are before the judge, do you feel you are able to give a professional opinion as to whether or not, from a professional standpoint, not a legal standpoint, examination 34944 has been shown to be job related?

A Yes, I can.

Q Before I ask you what your opinion is, would you please state why you feel you are able to give an opinion in light of Dr. Taylor's comment that it would take a long, long time to formulate such an opinion?

A Well, I want to make sure I am answering the right question. I cannot give you an opinion as to whether this particular test is content valid or not on the basis

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of what I have seen, but from what I have heard no one has shown that it is content valid. But it could be done.

Q What is your opinion --

THE COURT: I am a little bit confused there. There are various possibilities. You could give an opinion that it was not content valid, you could give an opinion that it was content valid, you could give an opinion that it's impossible to render such an opinion, or you could give an opinion that nobody else has shown it one way or the other.

It is the latter class that you have an opinion about?

THE WITNESS: Yes. I feel I can raise some questions about the content validity but I don't believe that I can state definitely as a professional that it is or is not content valid.

Q Can you tell me on what you base I guess your two opinions? Correct me if I am wrong. One is to your professional satisfaction there has been no showing that the test is job related based on the materials that you have seen and examined and heard?

A That's one, yes.

Q And also your opinion that you have substantial doubts as to whether the test is in fact valid?

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A Yes.

THE COURT: Just a moment while I get this. All right.

Q Are your opinions based on a review of the process by which the test was developed?

A Yes, and also by having talked to eight correction sergeants and visited a facility.

Q With regard to the process by which the test was developed, could you tell us on what specific factors you base your opinion?

A Well, the process is rather loosely defined. It does not include, until apparently lately, any determination of the reliability of the instruments, and this is all done after the fact, it is not done during the development of the instruments. And I just had a feeling that there were too few people involved who knew the correction officer's or correction sergeant's job and that although the general outline may have been correct, it was not done with enough detail to make a professional and sound test.

Q In your opinion, did the people who actually constructed the test, insofar as you have been able to listen to them or read about their work, have an exact picture of what they were trying to accomplish in the test?

A I heard no discussion of it.

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Q In your opinion, did the test constructors have adequate information as to the content of the job of correction sergeant?

A That's always a problem. Certainly they had been, many of them, correction sergeants at a previous time. I understand that since Attica the law has changed, the correction sergeant job has changed. Also, we have a problem with people who are too close to a job sometimes not being able to see what's truly important, and I did not get a feeling that people had studied the job from the point of view of building a test separately from their simply having had experience and doing the work.

Q That would be referring to the subject matter specialists?

A That's right.

Q How about Mr. Siegal and Mr. Taylor, who are not subject matter specialists but test construction specialists?

A Mr. Siegal seems to have had some background in psychometrics, and I cannot tell right now how much of that he applied in the development of the test and how much of it was done after the test was subject to litigation.

Q I am referring to their knowledge of the job content.

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A They are not, as I understand it, subject matter experts in this field.

Q They did testify that they had reviewed a number of general materials and, in addition, the class specifications, Plaintiffs' Exhibit 4, the K, S and A statements, Plaintiffs' Exhibit 8, and the job audit, Defendants' Exhibit E.

I would like you to examine those documents, please, and tell me whether in your opinion they contain a job description adequate for the purpose of constructing a content valid test.

A No, I don't believe so.

THE COURT: Would you specify again what exhibits those are?

THE WITNESS: Plaintiffs' Exhibits 4 and 8 and Defendants' Exhibit E.

Q What is missing or what is wrong with those in terms of a job description for that purpose?

A Basically, it's detail about what the person does, how he does it, why he does it, what skills really are involved, rather than a superficial statement of skills and knowledge, and it's not clear how important various aspects of the job are, nor is it clear at all which aspects of the job are the ones which are critical for success and

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failure on the job.

Q What elements of a proper job description for the purpose of developing a content valid test would you add to what is in those documents?

A Well, there certainly would be more detail about what the incumbent does and a description of what he does based in terms that are relevant to developing a test rather than for determining whether a job should be paid at a given grade level or not.

Q Could you give us a specific idea of exactly what terms you are indicating, in terms that would permit the development of a test?

A I think you would have more detail on the specific knowledges that are truly required, why they are required, how we know they are required and whether or not everybody has them. There are some things that everybody probably knows and there is no point testing them on.

Q Is it an important element of the job description to state what elements are crucial to success and what elements are of less importance?

A Yes, there should be a statement of the relative importance of various tasks.

Q Do any of those documents, and specifically Plaintiffs' Exhibit 4, indicate what's most important for

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job success?

A No.

Q Are your opinions which you have given us earlier in part based on a review of the substance of the test?

A Yes.

Q Let me give you a copy of Plaintiffs' Exhibit 18 and Plaintiffs' Exhibit 19, which contain the test, and ask you to explain specifically what factors within those documents your opinion is based on.

A Let's do it segment by segment. The first fifteen items have to do with laws and regulations, and so forth. When I asked the sergeants what actions they took based on laws and regulations, and so forth, some of them really couldn't answer. Some of them said, "Well, we don't really do much about the laws, we are concerned quite often with the regulations."

MRS. GORDON: At this point, your Honor, I have no objection to the witness testifying to his recollection of the events at Greenhaven, but I would appreciate it if he had data that he recorded at the time, that that be put in evidence so that we may have a record to refer back to.

THE COURT: Do you have any such document?

THE WITNESS: I have notes, your Honor, yes.

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THE COURT: Are they understandable?

THE WITNESS: Not only difficult to understand, but I am afraid difficult to read. My handwriting is bad.

THE COURT: Make them available to Mrs. Gordon if she wishes. I don't know how helpful that is going to be.

I am troubled a little bit about the extent to which the statement that Dr. Barrett is now giving constitutes hearsay. It seems to me that they are being presented for the truth of their content and not merely for the fact that the sergeants said this to Dr. Barrett, because if a sergeant said it but it isn't true, it doesn't mean anything.

Q Dr. Barrett, in answering, could you please indicate to what extent your answers are based on your visit to Greenhaven as opposed to other aspects of your review of this case and if it is based in part on your visit to Greenhaven would you indicate to what extent it is what you saw and to what extent someone told you about something.

A What I was talking about right now is based entirely on my visit to Greenhaven and also based entirely on the interviews with eight sergeants.

THE COURT: Without making this unduly complicated, though, you don't have personal knowledge of the extent to

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which the sergeants actually do have to administer the law, whatever you might call it; what you are saying now is based solely on what they told you, is that right?

THE WITNESS: That's right, your Honor.

Q By the way, is this how you would proceed to determine the job content if you were to validate a job itself?

A It would be one step, but if I were going to do a content validation study of this job, I would get information from other people, particularly correction officers who worked for the sergeants, supervisors, lieutenants, captains, and so forth, and my observations and interrogations would be somewhat more extensive.

Particularly I would ask people to give specific examples to illustrate any point that they make in more detail than I did.

Q Please then proceed with your discussion of this sub test and do indicate to the judge when we are dealing with things that someone told you rather than things you observed or know.

A According to what I learned from the sergeants, they are not really aware and conscious of reading and applying the rules and regulations so much as they are involved in taking various kinds of actions which are based

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on rules and regulations many of which are common sense in nature and for which one doesn't need to know what the rule or regulation is.

For example, one sergeant told me about the rear gate of the prison through which trucks enter. A truck enters in through one gate, which is then closed behind him, and the other gate is opened up and the truck proceeds inside, there never being a clear passage.

Every once in a while a semi-trailer arrives which is too long for the gate. So the correction officer tells the sergeant, the sergeant tells the deputy superintendent and the deputy superintendent says do or don't open the gate. That is covered by regulation but it is also something someone learns on the job. He is taught and it doesn't matter whether he reads the regulation. What is important is he open the gate properly and get the proper clearance.

THE COURT: I realize that, but isn't this also something which the top people in that situation would want a sergeant to be able to do correctly the first day he was on the job? I don't want to press Dr. Taylor's job too much on that point. That would be the kind of thing you may learn on the job, but you darn well ought to know when you start.

THE WITNESS: He would probably learn that the

first day he was a correction officer and assigned to that post.

THE COURT: You mean a correction officer's job?

THE WITNESS: Yes.

THE COURT: I thought you meant a sergeant's job. O.K.

Q Dr. Barrett, that particular incident apparently is something that happened or at least that a sergeant told you had happened. Looking over the first fifteen questions on Plaintiffs' Exhibit 18, have you noted whether these involve the kinds of situations likely to arise in a sergeant's job from what you know of it?

A I really don't know enough about the sergeant's job. I did not ask specific questions based on these questions and certainly none of this material came up spontaneously.

Q Do these questions seem to you to be aimed at the major aspects of job performance or lesser aspects of job performance?

A Most of them seem to be rather trivial or many of them have to do with things that the sergeant is not concerned with.

One point which came up repeatedly about rules and regulations was that the sergeant said if he didn't

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know he would call the deputy superintendent. He had someone there virtually at his elbow to answer the questions he couldn't answer.

Q I assume you have done some work with other types of jobs that involve following laws, rules and regulations, is that correct?

A No job analysis, no.

Q But you have reviewed such jobs and selection procedures?

A Yes, I have.

THE COURT: Was that any part of the problem in Bridgeport?

THE WITNESS: No, your Honor. The major test was an entry test which did not get into this kind of specific information.

Q In your view, is it a proper technique to ask in such situations questions about laws, rules or regulations which are related to trivial aspects of job performance?

A I don't believe so.

Q Or laws, rules and regulations which a person in that job would not have to actually apply in the course of his own duties?

A As soon as one does that, he is getting away

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from content validity. If the questions are not about what he really does, then the claim of content validity is vitiated.

There was a comment made by one of the witnesses to the effect that the purpose of asking one question, I think question three, was to determine whether the sergeants were up to date on the rules and had read the newest and latest rules and regulations. If that is the purpose, that is not content validity, that is something else.

THE COURT: Without minimizing what you have been saying, isn't it in a sense true that triviality and unlikelihood to use the materials in question on the job and lack of content validity are all another way of saying the same thing? We call it trivial but what we mean is who cares about it on the job? Somebody might consider that important in relation to his job, to another job, let us say?

THE WITNESS: That's right, yes.

THE COURT: O.K.

Q Have you reviewed the specific questions on this sub test?

A I beg your pardon?

Q Have you reviewed the specific questions of this sub test?

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A Yes, I have.

Q Are there particular ones which you consider -- how shall I put it? -- questionable?

A The first three have already been discussed and I don't think there is any point in going over that. I think number eight is particularly bad. The question asks:

"Which of the following persons could through the proper procedures be legally transferred to a state hospital for the mentally ill in the Department of Correctional Services?"

All these people are somehow under the control of the Department of Correctional Services and it seems to me that with the qualification of "the proper procedures," they could be moved anywhere. That makes the question a totality, really. Anybody could be moved anywhere using proper procedures. So it is a poorly written item.

Number 13 we have already gone through. There must have been some mistake in the way it was originally types out.

Number 11 says:

"The Employee Rule Book states: 'Each fire extinguisher, on the shoulder if possible, shall be painted with a color to indicate the content...' A new fire extinguisher containing WATER has just been

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purchased. It should be painted"

And the correct answer is "green."

Well, there are not many sergeants who are involved in the painting of fire extinguishers. They have a book to look up the answer if they don't know what it is. But certainly if the question has to do with knowing how to put out fires in a prison, that doesn't get at the problem. Someone should know there are electrical fires and oil fires and one should not put water on them and the fire extinguishers with water in them are identified by green, and that is another thing. All this says is what color. I think it is trivial.

THE COURT: This is to determine whether a man knows what the color of a fire extinguisher is, no matter how obliquely it may go about it.

THE WITNESS: I don't think it is central to a job.

THE COURT: That is something else again. But it doesn't just talk about painting fire extinguishers. It seems to me to find out whether the man taking this test knows what the fire extinguishers are in the place.

Q Have you reviewed the second sub test?

A Yes, I have.

Q Do you have any particular comments on items in that sub test?

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THE COURT: What numbers?

MR. BALLER: 16 through 30.

THE COURT: Starting with "The Saginaw Project"?

MR. BALLER: There is an indication on Exhibit 20.

A There has already been comment made about a couple of items which maybe I think I should reinforce. Number 18 says:

"If a rule is unpopular with the inmates the supervisor should"

And then the correct answer is"

"consistently enforce the rule regardless of its unpopularity."

I submit that that bespeaks a point of view toward rules which is rather narrow and the alternative is not even put there for a person to respond to, saying to enforce the rule temporarily and then question its validity.

Similarly, question 24 asks:

"Which one of the following is the primary function of a public relations program in a correctional department?"

The keyed answer is"

"assisting the correctional department in accomplishing its goals and objectives."

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I think that most people would and should answer B, which is:

"promoting favorable publicity for the correctional department."

THE COURT: Back to number 18 for a moment, I don't know whether what I am about to ask is really important or not.

Doesn't the validity, as distinct from the question of how the institution ought to be run, doesn't the validity of the answer to number 18 depend on what the administration of the institution is demanding of the sergeants? If the rule in this place is: By God, you will enforce these rules no matter whether you like them or whether the inmates like them, however foolish you and I think it might be, wouldn't the validity of the answer on that test be controlled by that philosphy?

THE WITNESS: Perhaps in part, your Honor, but there are many gaps here. I don't believe there is any place that enforces all rules uniformly and consistently, to begin with. So it doesn't really answer the question.

But I think more central to this is even if it were the proper answer and it were the policy of the institution, there is nothing in that selection of alternative A that says the correction sergeant will in fact do

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that. That is another issue.

THE COURT: I don't follow you.

THE WITNESS: People often can answer a question correctly as to what to do and then do the opposite.

THE COURT: Sure, yes.

THE WITNESS: Here I really don't know the situation in which people consistently enforce all rules regardless of unpopularity. I don't believe that happens. There is always some give and take. It is not a realistic answer.

THE COURT: Of course, that depends what you are testing for here, doesn't it? If the test is to find out, and it seems to me at least one reasonable objective is to find out, whether a potential sergeant knows the rules and policy of the administrators of the prison, whether that policy is good, bad or indifferent, so that, for example, an administrator can always hold his employees to a knowledge of the policy, I can't see why that wouldn't be at least one objective of questioning.

MR. BALLER: May I interject? We do have Mr. Sperbeck's testimony on the specific point, and since he does come from rather high up in the department, I think that would probably shed more light on it than Dr. Barrett's speculation, and I would refer to that. I think it was part of his redirect testimony.

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MRS. GORDON: I believe it was the deputy commissioner's testimony.

MR. BALLER: Maybe it was Mr. Quick. I may be getting them mixed up.

I don't mean to interrupt your discussion with Dr. Barrett, but it seems to me we do have --

THE COURT: I don't want to spend too much time on one question, anyway.

BY MR. BALLER:

Q Could you take a look at number 20, Dr. Barrett, and comment on that question?

A It says:

"Which one of the following best states the relationship between discipline and morale?"

A says: "Where morale is high, discipline will probably be maintained more easily."

And B says: "Where strict disciplinary measures are enforced, morale will most likely be high."

I think they are almost the same statement, to begin with, not quite but almost the same. Perhaps there is some evidence about prisons which is contrary to the experience in industry, but one of the things that used to be said long ago was that high morale and high production go well together, and the evidence really does not support

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that. And I really question whether it is true that high morale and discipline are maintained more easily. In some places I suppose prisoners have high morale because they are running the prison and there is no discipline. They may have high morale for that reason, maybe the wrong reason but the morale is high.

Q Do you know of any studies which have shown that statement A is false?

A No.

Q Do you know any that have shown it is true?

A No.

Q In other words, it just hasn't been shown?

A No.

Q Number A is the keyed answer?

A That's right.

Q Do you think from a test constructor's standpoint there is any inconsistency between number 18A being the correct answer and number 20B not being the correct answer?

THE COURT: 18A you are comparing with 20B?

MR. BALLER: Right.

A There might be.

Q Are there other questions on that particular sub part you would like to comment on or can we pass to the third sub part?

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A I think we could move on to the next sub part.

Q That is questions 31 through 45, the supervision sub test.

A These questions to me are the most questionable perhaps because I am most familiar in general with supervision, and in almost any situation we can find that people who are supervisors may be successful or unsuccessful following different sets of principles. There is no one set of guiding principles that tells us people who follow these principles are good supervisors and those who don't follow them are poor supervisors. And there is so much in the supervisor-subordinate relationship that it is very hard to write in four or five lines enough detail to give the flavor of the situation. So we wind up with a sort of Ann Landers situation where a complex interrelationship is described in two paragraphs and she gives an answer. I don't think that answer is necessarily valid.

That same situation applies here. For example, item 33 says:

"Assume that you supervise a group of employees who perform monotonous, repetitive work. In which one of the following ways can you best assure high morale and maintain satisfactory performance with this group of employees?"

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Again the assumed linkage exists between high morale and satisfactory performance. The keyed answer is:

"Maintain high performance standards and give liberal praise for work well done."

Well, that may work for some people but there are other people who don't do that, other people who find it difficult to do that who may still get the work done.

Item 34 says:

"Assume that a supervisor has several important reports and a work schedule to prepare which will require considerable thought and concentration. If possible, when should he try to get this work done?"

The answer is B: "during the early part of his shift."

I talked to sergeants who had different duties on their shifts and some of them were very busy in the first part of their shift and couldn't possibly spend time writing reports. Others were not busy.

This is really a nonsensical answer. It really depends on the situation in ways which are not specified.

THE COURT: In your opinion, what would be a proper answer to a question of that kind -- whenever he can find time?

THE WITNESS: Perhaps whenever he can find the

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time and peace and quiet to concentrate, an uninterrupted period of time.

BY MR. BALLER:

Q Would you, as a test constructor, write questions like this and select answers like this without reference to the particular job for which the test was being administered?

A I might, but then I would be very careful to go back and make sure that I had content validity for that job.

Q Would the answers given be correct for the whole range of jobs that might involve a supervisory situation?

THE COURT: I don't understand your question.

MR. BALLER: There are certain questions framed and answers given which Dr. Barrett has questioned, as I understand it, saying that they might or might not be the correct answers.

My question is, could different ones of the answers be correct or could one of the answers be correct or incorrect depending on what type of job was involved.

A Yes, in situations in general.

THE COURT: I am still lost somewhere. Are you talking about the actual proposed answers on this test?

MR. BALLER: Right, and I would again point out --

THE COURT: What do you mean, depending on the job

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involved? There is only one job.

MR. BALLER: I think the testimony is this particular sub test, the supervision sub test, was arranged for a job of classification and used for a range of classifications, not just the correction sergeant job.

THE COURT: This test on supervision, you mean.

Q Dr. Barrett, in your opinion, is question 40 a good question?

A No.

Q What is wrong with it?

A It reads:

"Which one of the following is the greatest disadvantage of standard operating procedures?"

Alternative A says: They allow simple operations to be reduced to a routine."

Which strikes me as not being a disadvantage at all but one of the purposes of standard operating procedures. So it's inappropriate when considered in the light of the stem.

B says: "They provide a means of checking on employees' performance."

Again that strikes me as being an advantage rather than a disadvantage and is again inappropriate.

C says: "They prevent employees from doing better

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than average work."

Which would be a disadvantage if we believed that was true.

D: "They shorten the time required to train new employees."

Which is certainly an advantage in itself and not a disadvantage.

E, the keyed correct response, is: "They promote uniformity when a change would increase efficiency."

So the testwise person can eliminate three of the alternatives immediately because they are not disadvantages. So if you didn't know what the answer was, he would perhaps flip a coin or a mental coin between the two which are in fact disadvantages and have an advantage over the person who was not used to taking this kind of test and trying to figure out what the right answer was regardless of what the words said.

THE COURT: I agree with your analysis, but would that depend on taking tests or just a general sense of logic that when something appears advantageous it is illogical to say it is disadvantageous?

THE WITNESS: It has to do with being testwise, and that is the art of getting the right answer to a test without knowing what the answer is through this kind of

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analysis.

From my experience with the Center for Urban Education, we found the blacks were not as testwise as the white students. So they missed out on this kind of item.

Q Do you think that answer 40E is inconsistent with answer 18A?

A It might be.

Q I ask you to look at the fourth sub test in Plaintiff's Exhibit 18, the report preparation sub test.

Do you consider this to be a well constructed sub test?

A No, I don't. Really, the items which I find to be most inappropriate are the last ones, numbers 56 through 60, which consists of five sentences arranged in scrambled order which, if unscrambled, would form a reasonable paragraph.

Now, the untestwise person looking at item 56 would perhaps read all five statements and try to figure out which should be first and then look around for the one that should be second. A person who is used to taking tests would look at the answers and see that the answers to all five alternatives start with 2. So then he would read 2.

"Although there is an abundant supply of aluminum

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for the near future, the supply is not unlimited."

Then looking further in the answers, he would see that three out of five of them have sentence 5 as the choice for the second sentence. So most people would say the odds are in his favor if he would look at sentence 5 next and it says:

"Furthermore, aluminum usage has been doubling every ten years."

It seems to fit in with the first statement. Now, then, he has to make a choice among the other three statements, but if he knows how to take tests he has an advantage from the way the test is written that he shouldn't have, and it turns out that in three out of five or four out of five of these questions, if he followed this kind of analysis, he would have a leg up figuring out the right answer which a person wouldn't have who simply went through the statements and tried to put them in order and then find that correct order reproduced down below. It's a poorly constructed set of items.

THE COURT: Is number 2 the correct answer to 56?

THE WITNESS: E is the correct answer, the fifth one.

THE COURT: I see. That's the way you do it.

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All right, thank you.

Q And on the same analysis the testwise person would also be able to guess which two sentences come first in number 57 and number 60 also, would they not?

THE COURT: You mean that every proposed first choice is number 3?

MR. BALLER: Is the same, and in three out of five the second choices are the same.

THE WITNESS: Or if they are not the same, the odds are in favor since it appears more often.

Q Have you ever in the course of your work tried to develop instruments to determine a testtaker's writing ability?

A Not directly, no.

Q Have you reviewed such instruments?

A Yes, I have.

Q Does this seem to you to be an accurate test of how well someone can prepare a written report?

A I'd have to know more about the nature of the reports and the standards that are held for such reports and it is a question of which report.

Are you talking about a technical report of a scientific investigation, a report of a fight in a prison yard? I can't answer that question.

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Q Would you attempt to test for writing ability by the use of information that was related to the type of report a person would supposedly write?

A I probably would. In fact, in this situation, since I have learned that correction officers write reports, one way to do it would be to take a sampe of reports written by various correction officers and grade them for clarity of writing style, if that's the issue at hand. This, you see, would have true content validity. He is judged on how well he does something which is part of the job.

If, as a sergeant, he writes the same kinds of reports, then evaluating his reports would be a content valid kind of test.

Q Let me ask you to take a look at Plaintiffs' Exhibit 19, the fifth sub test on judgment.

Do you consider this to be a well constructed sub test?

THE COURT: Which number is this now?

MR. BALLER: Plaintiffs' Exhibit 19.

THE COURT: What number?

MR. BALLER: I have not asked Dr. Barrett about any particular question.

Q Is it a well constructed sub test?

A I don't think so.

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Q What's wrong with it?

A I think in general it's working on the assumption that if a person can answer a multiple choice question, that is generally in the area of judgment, he has good judgment. I don't think that premise is supported by the kind of things that we know about the way people respond.

Q Are you aware of any evidence which would indicate that people don't act in judgment situations in the way they say they would act in judgment situations on examinations?

A There is a classic study of an attitude survey having to do with moral and ethical behavior among two groups of women. The results were substantially the same.

One was a group of school teachers, the other was a group of inmates in a prison. So they knew what the right answer was in the, quotes, correct answer sense but apparently did not behave in accordance with what they knew.

THE COURT: You mean, for example, a question is: "Is it honest to steal?" with the answer "No" doesn't mean that the person answering "No" won't necessarily steal?

A That's right.

Q Would a test containing the items that you have pointed out and the defects of test construction that you

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pointed out meet your standards of a professionally developed test?

A No.

Q Would it meet the standards of the profession generally?

A No.

Q I would like you to comment on the manner in which the passing score on examination 34944 was set at 70, and I believe you testified that you were here when that testimony was given so you know how it was arrived at.

A Well, as I earlier indicated, determining a passing score on the basis really of administrative convenience isn't psychometrically sound. The passing score should be set at some point which has to do with whether we are reasonably confident that we are really cutting out the poorer performers and not cutting out too many good performers.

THE COURT: When you say not psychometrically sound, you mean it has an unsatisfactory result as far as the people taking the test is concerned or what? I don't necessarily favor the way the state has done it, but I am trying to understand what your view is.

THE WITNESS: What I mean is, let's take it in some situations we can talk about economics, we can

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identify the cost of incorrect decisions, and one incorrect decision is to put someone on the job who can't do it, and the other is to fail to put someone on the job who can do it.

THE COURT: If there is a job opening?

THE WITNESS: Yes, if there is a job opening. If we have a test which has minimal validity, but not much, and particularly follows the pattern I showed before, and that is it is valid in rejecting the people who can't do it but not valid for distinguishing among those who can do it, then I think the cost gets to be high when the passing score is set so high that it is discriminating against those people who are poor at taking tests but who could do the job.

Now, I want to point out, too, that very rarely is only one procedure used in selection, and where it is used I think it is inappropriate to do so.

So if this test, let's say, was good at identifying the bottom ten per cent of correction officers in terms of their ability to be sergeants and left over 90 per cent of the candidates, it should be used for that purpose and some other means should be used for making the selection among that 90 per cent.

THE COURT: All right. Let me ask you this, as soon as I finish my notes: Up to now you have been talking about the method by which the passing grade was established

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in this case. Now, is there anything you have learned that would lead you to believe that in the case of this test the passing score was set so high that it discriminated against people who do not do very well on tests but do well on the job?

THE WITNESS: I don't have any evidence along those lines, your Honor.

THE COURT: I don't mean it is a failure on your part, but I wondered if you did have it.

THE WITNESS: No.

Q In your opinion, Dr. Barrett, is a predictive or empirical validity study professionally preferable to a content validation type study? y?

A Yes, it is.

Q For what reason?

A The reason is that the criterion related validity study measures just what we are trying to do with the test. The purpose of the test in general is to get people on the job who will be better than those other candidates who were rejected, and this is the only way you really know. If we rely on content validity, we then have to make that supposition that this content is important. In some cases it is quite clear that the content is important, again going back to the typist who types 80 per cent of the time.

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We would find a typing test could be content valid.

Also, where there is some specific hard body of knowledge that a person has to know such as the principles of bookkeeping to be a bookkeeper, there I think we have a reason to believe that content validity should be acceptable.

But we get into such a nebulous area as supervision, we find that the leap between the supposedly content valid test and the content of the job gets to be much greater. We have, for example, the difficulty of determining what is the, quote, correct answer. When one goes back to some text book for a correct answer, it's always possible to find some other text book that gives another answer that's correct. In fact, I have seen one book by O. W. Wilson quoted in support of alternative A, another book by O. W. Wilson quoted in support of alternative B. So it is difficult in determining a right answer, again in quotations.

The next step is that we have to develop a test where the right answer is presented along with wrong answers which are attractive. They are called distracting because they distract one from the correct answer.

Now, they can be so written that they are confusing, they are very nearly true, the difference between the correct one and the wrong one is very subtle, and we

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are now getting at test-taking ability whether one really knows what to do on the job.

THE COURT: I quite agree that can be done in the writing of tests, but wouldn't that apply regardless of what method you used to test the validity of the test?

THE WITNESS: We would find out, your Honor, if we did a criterion related validity study whether whatever it is we are measuring does help identify the better people. Maybe it is subtlety we are getting at, maybe it isn't. If we are justifying the test on the basis of content validity, the content of the job certainly is not making subtle distinction amongs test items, it is doing whatever the content of that item is about.

THE COURT: I will buy that, yes.

THE WITNESS: Then the other point, of course, is that even if people do select the, quote, correct answer and in real life it is the correct answer, they very often don't do that which they know they should do. So again we are one further step removed from the content of the test really measuring the content of the job and the performance of the individual.

THE COURT: Could one way the value of a criterion related validity study, one way to express it would be that the proof of the pudding is in the eating?

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THE WITNESS: Yes, exactly.

Q Are there circumstances in which a content validation is an acceptable substitute for an empirical predictive validation?

A Well, I would say, getting back to the EEOC guidelines, that since there are many circumstances in which a criterion related study is not technically feasible and we do have to make a selection, we may fall back on content and really recognizing that it is not getting at directly what we want to get at.

Q What do you understand by the use of the term "technically feasible"?

A Generally there are two elements in technical feasibility. One is the size of the sample and the reason for that limitation is we have a very small sample. The random variations among the individuals in that sample is likely to lead to the incorrect conclusion that a good test really is not good.

It's that kind of error that is made because of the small sample, which puts the employer at a great disadvantage because he may have a really good test but he only has ten people to try it out on and if he had 100 people he may show the test to be really valid but with ten people he can't because of the random variations and

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the way they happen to line up. So that is the first consideration.

The second is that there are situations in which we really cannot get a reasonably good criterion. One, for example, occurs when people work independently and we really don't know what one forest ranger is doing in his area of the woods as compared to some other forest ranger in another part of the woods. Nobody is there to see what he is doing.

Or it may be that what we are trying to predict is something we really can't afford to have. I am thinking in terms of some work that's been done in the selection of policemen and sergeants, and so forth, that is, we try to identify some people who have inappropriate personalities, they cannot stand stress, they have sexual problems that would interfere with their being policemen. They have hostility which will come out as policemen. We can't go through the ideal model and put a sample of these people deliberately on the job and see if they do misbehave as policemen. And so it may not be technically feasible to get a criterion of hostile, inappropriate policemen.

Q From the evidence that you have heard and the documents you have reviewed in this case, do you have any reason to believe that it would not be technically feasible

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to have done a criterion related validation in this case?

A I see no reason why it couldn't be done.

THE COURT: Let's hold it a moment there.

Do you mean done before the test was administered? You talked about predictive validation as concurrent validation. Are you saying it would be possible to conduct a predictive validation test here which I understand means that you validate the test before you administer it?

THE WITNESS: Yes, your Honor, I think I would have to go back to something that Mr. Siegal said in which he indicated that these tests are all different but they are all part of a continuing series. Had they started ten years ago to validate each test as it came along, they would have learned which kinds of tests were working, which ones were not, and could have developed a test over a period of time which would have if not direct, observable validity for each administration, we know it's a type of test build under a set of instructions and restrictions which is going to be valid if the previous ones were valid. They do have a technical problem.

THE COURT: I frankly don't know, it is a terribly new field, whether assuming that it would have been possible to validate the past tests on a criterion related basis, the defendants are legally held responsible for failing to

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do so, assuming that the test does meet other standards, in view of the newness of the subject matter here, and so on.

Are you saying that is the way it would have been predictively validated? You are not saying that once they administered 34944 they could have studied 34944 itself before they administered it? I don't know that the subtle distinction is important but I have to ask the questions while you are here in case they turn out to be later.

THE WITNESS: Not as I understand the laws and regulations under which the tests are built. I could give an analogy.

The College Entrance Examination Board gives an examination every year and that test is used in the selection of people to go to college and it is, of course, subject to very high considerations of security. However, what they do each year is give some of the students experimental tests or in the test are items which they are not going to use, they are really going to see how they are working and maybe actually use them next year or the year after. So with a continuing series of tests it is possible to do what one can't do on one test alone.

THE COURT: Let me put it this way: Along comes 34944 or the need for it and nobody ever has validated the

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past tests. If you had been responsible to develop such a test, what would you have felt would have been the best -- never mind the proper -- but the best procedure to follow to assure the most effective outcome?

THE WITNESS: Well, I think I would go from what we know to what we don't know, and what we do know is the test scores of people who took previous tests and we do know we could get at their performance and see if this kind of test is working.

These tests in previous years had several parts to them. We could validate each part separately. If, as I suspect, it turns out none of these were valid, we have to turn out and decide to have a whole new test development process.

THE COURT: How long would it take, given those resources you are aware of, how long would it have taken to check the last two tests, let's say?

THE WITNESS: That would be a matter of two or three months, maybe. The only thing they really have to do is to get good measures of the performance of the sergeants who were promoted on the basis of these other tests. They have the scores and that's not easy. It takes time. It takes a lot of knowledge of the job. It takes a very conscientious effort to get a measure of performance.

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And if they had done that, then they could tell if the previous tests of this type were working. If they were, they could say continue along those lines. If not, they we would have to go back to the very beginning and maybe rethink the type of test to be given, what other kinds of measures might be used.

For example, these correction officers are around three or four years before they are promoted. There is ample opportunity to get a measure of their performance as correction officers, which has some correspondence and overlap with what their job would be as sergeants. You could use that information, for example.

THE COURT: Thank you.

Q Would it also be possible -- technically feasible, rather -- to do a criterion related study of the candidates' performance as correction officers and how it correlates with their performance on the sergeant's examination?

A As I understand, that would be a-rating of their performance as officers and how that predicts success as sergeants?

Q Right.

A Yes, that could be done.

Q Would it be technically feasible to have done a criterion related study of 34944 after its administration?

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A Not until there had been some people put on the job and their performance evaluated.

THE COURT: They had to work for a sufficient time to make it a meaningful evaluation?

THE WITNESS: That's right.

Q But that could be done in the case of the group of provisionals in this case?

THE COURT: It could have been done by now, I suppose?

THE WITNESS: I don't remember the dates they were promoted.

Q There are various dates.

THE COURT: Basically, a year ago; August, '72.

MR. BALLER: I am speaking not only of the few black provisionals but there are a large number of provisionals serving in the job now and there has been a large number of provisionals, some of them different people than last fall.

THE COURT: The impression I got from the testimony of the defense witnesses was that -- not just blacks but a very substantial number of provisional appoints was made in August of '72. Anyway, that must be in the record somewhere. Let's assume it is August, '72.

THE WITNESS: There is one technical but real caveat in doing that, and that is that these people who

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are provisionals now were selected by some other basis. I don't know what it was. I think it was based in part upon their past performance, in which case we are not getting the same kind of sample of people that we would get if you promoted people on the basis of the test, and we might be misled by doing that. We might find out this means of promoting them was better than the test, too.

Q Do you need a computer to make it technically feasible to make a criterion related validation scheme?

A It could be done.

Q If an organization fails to develop a rating system which is adequate to allow the rating of job performance, is that an excuse which constitutes technical infeasibility as you understand the term?

A No.

Q To a criterion related study.

A No, it's not a part of technical feasibility. People very often develop rating and evaluation schemes solely for the purpose of conducting a validation study and they keep that quite separate from the ongoing evaluation.

Q May I ask you to look at Exhibit DD of the defendants in this case? I think it is unclear, and I will ask you, please, to explain what is the meaning in that exhibit of NS, which stands for non-significant?

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A That means that the difference that was observed between the whites and the blacks or the whites and Hispanics is not so large that given the other conditions that we have, that is, the number of cases and the variability of these cases, for us to conclude that this was not an accidental relationship.

That's a complicated statement. It's full of all sorts of negatives. If we might turn it around and say that there is a reasonably good likelihood that the difference that we found really is a chance variation among two groups which are essentially the same as far as test performance is concerned.

Q Can you please tell us what is the relationship between the size of the sample and the determination that a difference is non-significant?

A Other things being equal, as the size of the sample decreases it becomes harder to show a significant difference between two groups.

Q To make it concrete, I note that many of the NS indications on this exhibit occur in boxes where the N is 9 or 8 or 14 or 6.

In your experience, what is the likelihood of obtaining significant correlations given samples of that size?

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A Rather small unless there is a tremendous difference between the two groups.

THE COURT: What exhibit number is that?

MR. BALLER: DD, Mr. Siegal's summary, the ethnic analysis.

THE COURT: I remember what it is.

Q Have you reviewed other examinations besides this one that have the pattern of groups of minority persons scoring lower than groups of white people?

A Yes, I have.

Q And has this occurred in your private consulting practice?

A Yes.

Q Have you been able in those situations to determine whether or not these differences in test scoring were reflected in differences in job performance or job potential?

A Well, we have studied that very relationship with a Ford Foundation grant and found that there is no ready way to predict in advance whether the differences in test scores between the blacks and the whites will be reflected in later job performance. Sometimes it is, sometimes it isn't.

Q When you refer to "we," at which stage?

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A Our co-workers.

Q At Stevens?

A New York University.

Q When did that occur?

A About 1965 we started on a two-year program.

THE COURT: Your study showed that sometimes it turned out that a test showed that a man would do poorly on the job, let's say, when he had done poorly on the test and other times it didn't?

THE WITNESS: Also it showed that sometimes the blacks who scored lower as a group also performed more poorly as a group. Sometimes when blacks scored poorly as a group they did just as well on the job. The test might be valid for one group and not so valid for another group. It is a variable situation.

THE COURT: In other words, you weren't able to pin down the connection between performance on the test and performance on the job?

A That's right.

Q Can you give us an idea what types of jobs were involved in those studies?

A Office workers, nurses, trainees in a training program for disadvantaged in New York City.

Q Were you able to determine in the case of

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situations where the different score patterns between white and minority people were not reflected in different job performance patterns? In most cases were you able to determine what factors were responsible for the different test scoring patterns?

A No, we weren't.

Q Do people within your profession have a hypothesis as to what factors are involved in such situations?

A Yes, there are a number of them.

Q Admitting that they are hypotheses, can you tell us what the most current ones are?

A Well, probably the one that gets the most attention is the rather obvious difference in education between the minority and non-minority segments of our population.

THE COURT: We are talking about hypotheses as to why, for example, black people do not do as well on these tests?

THE WITNESS: Yes.

THE COURT: We are not talking about relation between test performance and job performance?

THE WITNESS: That's right. That's one. Another is this matter of testwiseness that I mentioned, and it seems that the attitude towards tests and testing is different in the black schools in New York

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City, for example, that we dealt with as compared to the white schools where students are highly oriented towards getting good marks on their tests and teach each other the means of getting good grades.

Another hypothesis has been advanced by Professor Erwin Katz, formerly at New York University when I was there. He did a series of studies using college students, both north and south, both black and white, and he varied the testing situation for them along these lines and his generalization is that there was a more or less threatening situation.

For a more threatening situation, for example, the black would be the only black person in the room being tested or the white would be the only white person in the room being tested. The less threatening situation would involve having a mixture of blacks and whites in the room and perhaps the test examiner would be of the same race as the person taking the test. He would tell one group that "This is a very hard test, don't worry if you don't do well on it." He would tell another group about the same test, "This is an easy test and anyone who can't finish it is really not smart," that sort of thing.

He found the situation of threat led to a detriment in test scores for both groups but that the detriment

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consistently greater among the blacks. This was an experiment. The participants knew it was an experiment and that the results would have no effect on their future life, no effect on their education or their jobs. Furthermore, they were all college educated people. They were in college at the time, anyway. So they were more used to taking tests and had learned how to deal with them, at least how to deal with them and get partway in college.

It was necessary to extrapolate back down to people who had less education and know that this test is going to decide whether they will be considered as candidates. So the threat must be much greater.

I conclude from this that in general taking these tests is harder for blacks than for whites.

Q To your knowledge, Dr. Barrett, have predictively valid selection instruments been developed or are they being developed for law enforcement field positions anywhere in the United States?

A There are some that are being developed; there are some that I have heard about that may or may not already be validated. I haven't seen the reports. But the International Association of Chiefs of Police has a grant from the Police Foundation. They are cooperating with other organizations to build a more reasonable and valid set of

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tests for the selection of police.

Q Where is the International Association of Police Chiefs?

A It's in Gathersburg, Maryland.

THE COURT: When you say they are working towards the building of a more valid set of tests, are they doing that along the lines of criterion related validity?

THE WITNESS: Yes, they are. Also, I understand that the City of Philadelphia has a contract with the Educational Testing Service for about $200,000 to develop a set of tests for policemen.

THE COURT: But the important thing is they are criterion validated tests, is that right?

THE WITNESS: Yes.

Q Is there any such activity here in New York?

A The New York City Rand Corporation has done a study of background data which I think is a preliminary study which tends to show that background data can be useful in predicting success on a job and that it does not work the same for the black and the white groups.

Also, one thing that they have uncovered which I think is quite significant is that performance during probation is a very good predictor of later performance

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on the job. So this is another kind of selection instrument that can be used and that is really used in probation.

Q Who is the Rand Corporation's client in that particular study?

A New York City Police Department.

Q Dr. Barrett, if you were to receive the assignment of constructing a valid selection instrument or set of instruments for the correction sergeant position, how would you proceed?

A Well, I would really do the things that I mentioned earlier. I would have as many discussions as possible with the policy-making people to find out what it was we were trying to accomplish, then go through job analysis, and then I would look as far afield as I could for promising selection instruments, and for the moment I would set aside considerations of cost and come back to them later.

THE COURT: You mean by "selection instruments" not just tests?

THE WITNESS: That's right.

THE COURT: Certainly not just multiple choice tests?

THE WITNESS: That's right. For example, a number of organizations now are involved in what they call assessment centers where a candidate for promotion maybe

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given away for two or three days and is given a whole series of selection devices. He may be given a group interview with other people, various kinds of situational tests in which he acts the role of someone in a given setting. There may be any kind of personality tests, long and extensive interviews, thorough check into his background, and so forth, and it seems that these procedures are working, they are able to identify better people through these techniques.

THE COURT: Where is this occurring?

THE WITNESS: American Telephone and Telegraph, for example, has been one of the early people in this group. They have done a lot of work on it.

Q Are they used for supervisory positions?

A Supervisory or managerial positions. I don't know how far down the line they go.

Q I am sorry to have interrupted you.

A It's all right. I had finished.

Q Can you estimate how long this process might take to develop a valid instrument?

A Well, this would be a fairly long process, I would say, particularly to explore the surrounding field. It would take a year or more.

MR. BALLER: No further questions.

THE COURT: Mrs. Gordon, I think it would be

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best to break for lunch at this time.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 P.M.

MRS. GORDON: Your Honor, during the break, Mr. Baller and I did compare our lists of exhibits. Mr. Baller had a list from the clerk and it would appear some things we thought were in evidence are apparently not on the list. I would like to go through the ones where there was any question and if there was a new one, we will give it to you now.

THE COURT: As far as giving me these things are concerned, it has been useful to have copies to follow. But after the trial I propose probably to return everything to everybody and let them, when they submit post-trial memoranda, give me whatever they want to bring to my attention or all the exhibits.

MRS. GORDON: I am doing this for the record. I want to be sure what is supposed to be in the record is reflected there.

There was some question, apparently on Defendants' Exhibit H, ethnic item analysis, which we do have, I recall, being marked in evidence but the clerk doesn't seem to have.

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GW Barrett-

THE COURT: I take it, Mr. Baller, that none of these exhibits is objected to by you.

MR. BALLER: This is our statement of what we have agreed should be in evidence.

xxxx (Defendants' Exhibit H was received in evidence.)

MRS. GORDON: Mr. Baller and I also have agreed if one of us makes a mistake we will rectify it together.

D.X. I is in evidence.

Defendants' Exhibit J is in evidence, the text of the training course.

MR. KANTOR: That is already marked in evidence.

MRS. GORDON: Some of them should be marked but are not reflected on the clerk's list.

Defendants' Exhibit M, recommendations of the Ossining supervisory staff to Theodore Schubin.

Defendants' Exhibit T, diagram of Greenhaven Correctional Facility, showing sergeants' assignments. That has already been marked in, or should have been.

D.X. U is a roster list from Ossining which should have been marked in evidence.

Defendants' Exhibit X, candidate appeals from Kirkland and Hayes and decisions on items placed in issue by them.

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And Defendants' Exhibit Y, candidate objection forms for plaintiffs Kirkland and Hayes.

MR. KANTOR: You have this marked for identification but it is in evidence.

(Defendants' Exhibit Y was received in evidence.)

MRS. GORDON: That's it, your Honor.

R I C H A R D S. B A R R E T T, resumed.

CROSS EXAMINATION

BY MRS. GORDON:

Q Dr. Barrett, is criterion related validation a preferred form of validation or the preferred form?

A Yes.

Q Is there any disagreement in the field on whether or not it is to be preferred over other validation processes?

A There is some disagreement, I am sure, on everything.

Q Do you recognize Dr. William Gorham as an authority in the test validation field?

A I recognize him as having a responsible position in the federal government. I really can't say I recognize him as an authority.

THE COURT: For my edification, what is his position, if you know?

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THE WITNESS: He was acting chief of the Civil Service Testing Unit, whatever it was, and I think is now deputy chief.

THE COURT: Civil Service Testing Service, is that what you said?

THE WITNESS: That is not the proper title, I am sure, but that's what he does.

MRS. GORDON: United States Civil Service Commission, I think.

Q Do you recognize Dr. Kenneth Millard as an authority in the test validation field?

A I know Dr. Millard. I don't really see his work cited much on an authoritative basis.

Q By the way, are you aware of whether or not Dr. Millard is also associated with the United States Civil Service Commission?

A I believe he is.

Q Are you aware of the view of the United States Civil Service Commission on criterion related validation as being a preferable form of validation?

A Yes, I am.

Q Is that view in agreement with yours?

A No.

THE COURT: What is it?

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THE WITNESS: Well, their view is that --

THE COURT: This is the Commission's view?

THE WITNESS: As I understand it, and I find it hard to interpret their terminology, they have --

THE COURT: You share that with Dr. Taylor, apparently, as to the EEOC.

MRS. GORDON: That goes the other way.

THE WITNESS: The Civil Service Commission has promulgated a set of regulations in which they favor what they call rational validity.

THE COURT: As distinct from criterion related validity?

THE WITNESS: Yes. And they give the rational validity the first position, and criterion related validity is to be done when one cannot establish rational validity.

Q Does the APA share your view that criterion related validation is to be preferred?

A I do believe so.

Q Is the utility of criterion related validation contingent in any way on whether or not it is used with reference to an achievement test or to an aptitude test?

THE COURT: You read very well but these are very complicated questions if you are a person who doesn't know what the question is going to be. I don't know

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whether Dr. Barrett is primed for them, but I am not.

Would you read that slowly, please.

MRS. GORDON: I am sorry to have to read, your Honor. It is a technical field.

THE COURT: Read it slowly enough so I can understand what is being asked.

Q Is the criterion of criterion related validation contingent in any way on whether it is used with reference to an achievement test or an aptitude test? Perhaps we should substitute aptitude examination or achievement examination.

A Those words tend to confuse the issue. If one wants to establish how much someone knows or has learned about a field, then the appropriate kind of test is one which is content valid. If one is trying to predict how someone will perform in the future on a job, in school or anywhere else, then a criterion related test or criterion related validity study is appropriate for the test.

Q Are there any special problems which operate in the civil service -- with respect to civil service examinations and affect the applicability of criterion related validation?

A The law sometimes seems to contravene what I consider to be sound professional practices. There is

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nothing in civil service as far as I can make out that makes it impossible for them to use methods which are appropriate in industry. There may be laws which limit the freedom to act, but that's not a professional issue.

Q Is the truncation of sample a problem peculiarly related to the civil service examinations field?

A No. Wherever a test is used to eliminate some people from consideration, we have what is called a truncated sample. If we are attempting to validate a test by the criterion method, either in civil service or in private industry, our results are somewhat distorted by the fact that a good portion of our original sample is not there.

Q Would they be more or less distorted in the promotion situation as opposed to the entry level situation?

A It depends on the selection ratio, which is the proportion of applicants or candidates who are either hired or promoted.

Q Just let me ask you to elaborate that for a minute. For example, in the Vulcan Society case, which I am sure you are somewhat familiar with, an entry level examination was involved and let's say hypothetically 11,000 candidates took the examination and 7,000 passed.

In comparison, let us take the sergeant title

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situation, where approximately [illegible] people take the examination but three to four hundred pass, are there differences involved in those two contexts in terms of the problem of a truncated sample?

A Are the statistics on who was actually hired similar to those who were passed? What counts is who is hired.

Q Let's assume the city hires 3,000 people out of three -- three or four thousand people out of that group initially, whereas the Department of Corrections hires 105 out of its 400 group initially.

A It makes a difference. It makes it harder to show that the test is valid.

THE COURT: Because of the smaller number?

THE WITNESS: Not only because of the smallness of the sample but because we are getting people who do best on the tests. We don't have anybody who did poorly on the tests. However, this is not unusual. I worked on a study with Lever Brothers where routinely they selected one person out of 14 applicants and we got valid results.

Q Assuming you were to develop a criterion or criteria for the correction sergeant title, I am interested how you would go about it. First I would like to establish something.

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It is clear, is it not, that the criteria in a criterion related study is not the job itself but some particular measure of the job?

A It is not a measure of the job at all. It is a measure of the performance of each individual on the job which may be relative performance. We may rank them from best down to worst or we may rate them by saying so many are excellent, so many are good, so many are poor, so many are unacceptable.

Q There has to be some type of mathematical formula, doesn't there?

A Not formula.

Q It has to be capable of mathematical assessment?

A You have to be able to reduce it to a number. In the simplest case it was zero and one. Zero is unsatisfactory, one is satisfactory.

THE COURT: It is a coding scheme which can go up to as many points as one has on the scale.

Q In terms of developing criteria for the sergeant title, I believe you testified on direct examination that supervisors' evaluations were the poorest thing to use in criteria assessments, is that correct?

A No.

Q Did I get you right?

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A No.

Q Would you tell us how you would go about developing criteria for the sergeant title?

A In that case I would probably be forced to use some kind of evaluation by supervisors because the job is not one which yields a measurable output. There is no sales, there is no number of pieces produced or things like that.

And what I would do, to repeat, is to really find out what we are looking for, what the critical issues are, develop scale statements of different levels of proficiency on these particular critical issues. I would then train people in the use of these scales, I would do what I could to motivate them to do well.

For example, let them know their ratings are going to be reviewed and that they will have to substantiate whatever they say in review by recalling some kinds of examples of good or poor behavior.

THE COURT: You are talking about the rater?

THE WITNESS: Yes, the rater will be trained in this fashion. His supervisor may have to look over his ratings, and his supervisor may look over both those ratings. There are a number of things none of which is wholly satisfactory, to be sure, but they do improve the

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quality of ratings.

Q I think Dr. Taylor noted the other day that the development of appropriate criterion measures is a field that is in its infancy.

Do you agree with that statement?

A I can't evaluate a term like "infancy." It's something which people have been working on for a number of years, including Dr. Taylor. How long can one be an infant? It is going back 20 or 30 years.

Q Would you say that the level of test development is higher than the level of criterion development right now?

A Yes.

Q I am very interested to know, in terms of the sergeant title, what types of actions you would take to avoid criterion deficiency and criterion contamination.

A Well, I think I ought to define them if they are not wellknown. A criterion is deficient if some important element is not being measured, and the only way I know to handle that problem is to do a thorough job analysis and decide what things are important and make sure they are measured.

Criterion contamination exists when the criterion is somehow influenced by the predictor, the most obvious case being the rater who knows what the test scores were

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for people he is investigating, and keeps test scores locked up where the sergeant or supervisor couldn't see them.

THE COURT: Would you say there was criterion contamination in those TV shows in which payola played a part several years ago?

THE WITNESS: I would think so, yes.

Another part of criterion contamination would be, I think, in the context in which we are speaking, a situation in which a person might rate another person high or low because he is of an ethnic or racial group which he favors or does not favor. No one, of course, has a complete solution to that problem or even a partial solution that we would totally accept.

For instance, there is considerable evidence that people rate subordinates of the same race higher than they do people of the opposite or another race.

Q We discussed that problem, I recall, during the course of your deposition in terms of reliability of the criteria.

Did you indicate then that to avoid that type of situation you would probably need two raters?

A Well, if you can get two raters or three raters, you get more raters if you can so long as they know the performance that they are rating. It's easy to get ten

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raters to rate one person but maybe two of them know what they are doing. That's no good.

THE COURT: How about getting supervisors of the same race in all cases or of his opposite race in all cases?

THE WITNESS: There is a certain practical problem because -- then you wouldn't know who to believe anyway. Maybe they are favoring people of the same race irrationally. Maybe not they are putting someone downstairs but they are putting someone else upstairs.

Q This is an operational process, this rating, isn't it? Let me rephrase the question.

Assuming you were using an already developed criteria, for example, do you rate them once, do you rate them twice, do you have to rate them within a fixed time frame?

A It depends on your purposes. If you are rating people for the purpose of validating one test, you might have them rated once. If people are being rated as part of an ongoing personnel program, it may be that they be rated periodically, maybe more frequently when they are new employees and less frequently as they are longer on the job.

Q If you were just developing the system, would

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you have to rate them more often to make to enhance the reliability of the system?

A For which purpose now?

Q For developing criteria for the sergeant title. When you first start out.

Let's assume we don't have the criteria right now. We are going to go on and develop them.

A I have worked in situations where we have only had one rating for each person for each study, that's all.

Q The rater has to be somebody closely associated with the sergeant, the foreman, his immediate supervisor?

A Yes.

Q Someone who sees him on a daily basis?

A I don't know whether daily. He has to know the person's performance well enough in order to be able to rate it.

THE COURT: As a matter of curiosity, I suppose it wouldn't work in a sergeant's situation where the sergeants were separated from each other, but is it ever the case that rating is done by fellow workers?

THE WITNESS: It's been done, your Honor, and it's a very paradoxical situation, that is, the evidence is that they know best what their co-workers are doing and they can rate them best. The problem is will they rate

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them best. Because as soon as one sees that his rating of his co-workers may influence his chances for promotion, we introduce a contaminating process which may vitiate the whole process.

Q Is an example of contamination of a criterion including in the criterion measure or assessing in the criterion measure incidents that aren't related to job performance?

A Yes.

Q For example, if an individual employee has a letter in his file that says, "You did a good job in assisting to arrest a thief in New York last week. I want to congratulate you," assuming that the arrest of the thief was not in the context of a corrections facility, would using that type of material be an example of criterion contamination?

A Yes, I believe so.

Q Now, assuming the operational level of the New York State Department of Correctional Services as it is at the present time and that they give in that context certain ratings called satisfactory and unsatisfactory performance ratings and that at a given facility, such as Ossining, among a group of 360 or so employees seven or eight such unsatisfactory ratings were given in a calendar year, could

such ratings serve any useful purpose in a criterion measure?

A I am quite sure it wouldn't. It would be necessary under those circumstances to develop a special rating for the purpose of validating the test.

Q In terms of the sergeant title and from your knowledge of this case and your visit to Greenhaven, would you be developing a criterion or criteria?

A Probably criteria.

Q How many would you estimate you would need?

A It's hard to say. I'd have to examine the job. Certainly there should be some measure of his ability to supervise his subordinates; I suppose there should be some measure of his ability to maintain security within the institution; we may have a measure of his ability to relate with and deal with the inmates; might have, depending if the situation were along these lines, he might have to measure the knowledge of the person: did not know what to do under certain circumstances, his handling of emergencies.

Q And all of these factors, assuming they were shown to be appropriate through job analysis or development, would have to be rated in as much of a reliable way as could be established?

A Yes.

Q What is opportunity bias in criterion related

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validity?

A Opportunity bias is most prominent when we are dealing with an objective criterion. Let's say sales for a salesman. If the salesman is assigned a rich territory, it's easier for him to make a good record in sales than if he is the same person but assigned to a poor territory.

Q Let's assume for the moment that in August and September of 1972, approximately 65 provisionals were appointed to the sergeant title and that all of them left that title, namely, reverted to their underlying title by approximately April of 1973, leaving ten or so provisionals in the title.

Could ratings generated from the incumbency of those provisionals be useful in a criterion study?

THE COURT: As to the ten?

MRS. GORDON: Either the first 65 for the time they were in or the ten.

A How long ago did they revert to their original status?

Q Let's assume all but ten reverted to their original status in April, 1973, and they were in the title no longer than from August 1st.

THE COURT: Eight months.

Q Eight months, approximately.

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A I'd have to look at it closely before I could make up my mind. It seems like it was a short time and also it was a while ago and people have forgotten what they saw. Memories will have faded.

Q Is it necessary to appraise the validity of the criteria or criterion?

A Yes.

Q Doctor, I refer you to page 11B of the transcript of your deposition. Would you like a copy?

A Yes, it might help.

MRS. GORDON: Do you have a copy of the doctor's deposition?

MR. BALLER: Shall I give this to him?

MRS. GORDON: Yes, why don't you.

(Document handed to witness.)

Q If you go to page 11B. It is unfortunately a confusing numbering system. I would just like to read you this portion.

THE COURT: As the basis of a question?

MRS. GORDON: Yes, sir.

Q "Q How do you appraise the reliability or validity of the criteria?

"A Reliability is easy. We may get two different raters to rate the same person and see if they

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agree, and if they do not agree and haven't been collusive in their agreement we say we have reliability or we have" -- going over to 12B -- "more measures that are more objective such as absenteeism. The validity of the criteria again has to go back to informed judgment. There is no other standard to compare the criteria to since it is the standard itself."

Is there anything inconsistent there with what you just said?

A No. I think I did hear you put in a "not" where I didn't have one. Maybe I heard wrong, but the way it reads here and the way I would agree with it, the first sentence says: "We may get two different raters to rate the same person and see if they agree and if they do agree and haven't been collusive."

Q Right. I am more concerned with the last sentence on page 12, "The validity of the criteria again has to go back to informed judgment. There is no other standard you can compare the criteria to since it is the standard itself."

A That's right.

Q By that I take it you mean that the assessment of the validity of the criteria is a judgmental function?

A Well, it's a judgment based on not only job

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analysis but on data which I mentioned like reliability.

Q I draw your attention to the nurses' study you mentioned in your direct examination and we also had some discussion about it in the deposition.

By the way, that study appears as study 4 in Testing and Fair Employment Practices, right, which is a book which appears in the vitae you gave to the court?

A Right.

Q Now, as I understand it, in that study, and you are free to correct me anywhere along the way, there you took black and white candidates from separate schools who had taken the pre-nursing and guidance examination administered by the National League for Nurses and that test was essentially an aptitude test battery, was it not?

A That's right.

Q And these were nursing students either at the inception or shortly after the inception of their nursing education?

A I think they took it as applicants to the education.

Q To the school?

A Yes.

Q Now, you utilized in that study that battery of tests as your predictor, didn't you?

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A That's right.

Q Now, one of the major criteria in the study was the licensing certification examination, is that correct?

A That's right.

Q Which was a written test consisting of five subject matter parts, is that right?

A I can't recall how many parts there were.

Q But it was a subject matter achievement type of test, was it not?

A Yes.

Q Now, what was the nature of that criteria? Was it not a content valid test?

A It was a test that was certainly designed to be content valid. I can't be sure that it was.

Q In other words, you didn't go to examine or find out whether the licensing examination was in fact a content valid examination?

A That's right.

Q How did you assess the validity of your criteria in that study?

A We assessed it on a rather pragmatic basis that this was an examination that the nurses had to pass in order to get their licenses.

Q In doing that, did you assume the validity of

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THE COURT: Let me be sure I understand what I believe is the train of thought. Are you talking about a study that you did in which you used as the criterion to validate a test given for entrance, another test given at a later time?

THE WITNESS: That's right.

THE COURT: O. K.

A What is the question?

THE COURT: The question Mrs. Gordon is asking you is whether you in turn validated the test used as a criterion.

Is that correct?

MRS. GORDON: Whether he had validated the criteria.

THE COURT: Which was in turn a test?

MRS. GORDON: Right, which was itself a test.

THE WITNESS: No, I don't believe we looked into that test.

THE COURT: Your theory being it didn't make any difference, I take it, that they had to pass the test and the question was whether the first test was a device which would help predict whether they could pass the second

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test, is that right?

THE WITNESS: That's part of the theory, your Honor. There is more to it than that, but it is probably not relevant to our discussion.

Q Did you look at -- I think we have finished with this line of questioning but I am interested to know, in terms of the content or purportedly content valid test that was the criteria, did you look at the items at all on that test?

A No, we didn't.

Q Did you make any judgment about them?

A No.

THE COURT: Would it be fair to compare that situation with one in which -- I am hesitating because I don't know if the actual test I am thinking about is related in any way.

Would this be an analogy? LSAT's, as they call them, legal aptitude tests, are given to students going into law school. Would it be analogous to test the validity of the LSAT, if that's what it's called, by seeing how law students then did during law school on law school exams?

THE WITNESS: Yes. If that was the question we were concerned with, yes. If the question we are concerned with is whether the LSAT identifies people who would

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be good lawyers, we would do something else.

THE COURT: That's right. In this case you weren't so concerned?

THE WITNESS: That's right.

THE COURT: How do you find out whether somebody is going to be a good lawyer?

THE WITNESS: I don't know. Maybe some day we will find out, your Honor.

MRS. GORDON: That is exactly what I wanted to bring up.

Q In the context we are operating, the better analog would be between the bar examination and performance of the lawyer, is that correct? That is essentially the same type of thing --

THE COURT: For 34944?

MRS. GORDON: Right.

THE COURT: I was making the analogy between the law situation and the example that you had been questioning Dr. Barrett about, the nurses' exam.

MRS. GORDON: Certainly, your Honor. I wanted to see if we could find a more appropriate analog.

Q Would that be an appropriate analog, the bar examination and then criteria going to job performance of lawyers?

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A There are two comments I would like to make. Number one, the bar examination is a qualification examination, that is, one passes or one fails. Everyone who passes is put in the same pool and there is no selection made from the top by anybody since, as I understand it, no one knows what the scores are.

The other comment is perhaps a bit gratuitous, and that is it is being sued in fifteen states as being discriminatory.

Q Luckily we are not here to validate the bar examination.

MRS. GORDON: Off the record, we just did the alien requirement.

THE COURT: I thought it was discriminatory because I passed.

Q Now, in your deposition, at page 17, I asked you to define the term "face validity."

A 17 in which section?

Q 17, the first few pages. Otherwise it goes 17A, 17B, 17C. No letters.

A All right.

Q That's one of our more corrected pages. I am interested in what the definition is. You defined it as "Face validity means that the test looks good to the layman

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and that the test seems sensible. It has some appearance of being valid. It has nothing to do with content validity.

Now, what I want to ask you is whether the converse of that proposition is also true, namely, if the test looks bad to the layman and if it doesn't seem sensible, that type of assessment also has nothing to do with the test content validity?

A That's right.

Q Now, as you are aware and I think you mentioned in your direct testimony, we are all here obviously concerned with the concept of job relatedness, and what I would like to know is whether in your opinion there is another concept known as specific job relatedness.

There may be, but I am not familiar with it.

Q In terms of the term "content related process," do you agree this is essentially a judgmental process?

A Yes.

Q And that consensus along the way, obviously competent consensus, is significant in that process, is that right?

A Yes.

THE COURT: You mean that if a group of people agree that something is job related it is more likely to be job related than if they don't?

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THE WITNESS: I was hinging a lot of my answer on Mrs. Gordon's use of the word "competent." They have to be basing their decision on as good evidence as can be gathered.

Q Who is this a consensus between? Is it a consensus between job analyzers and test constructors themselves or is it a consensus between those individuals and what we heard Dr. Taylor call subject matter experts, namely, the operations people?

A I am not sure I get the distinction. Who would be involved would be the people who knew the job, on the one hand, and those who knew testing, on the other hand, and probably those at a higher level who knew the aims and objectives and purposes of the organization in a more sophisticated fashion, perhaps, than people working on the job.

Q Those would be the policy makers you mentioned before?

A Yes.

Q But they come out of the field, out of the field you are testing?

A Yes, except for the testing experts, who would come out of another field.

Q Now, in the content type of process, isn't it necessarily so that the pass point of an examination is set

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prior to the conduct of the examination?

THE COURT: In a content related examination?

MRS. GORDON: Yes.

A I don't think that's necessarily so.

THE COURT: I didn't even understand it happened in this case. Did it?

MRS. GORDON: That is somewhat unclear. Let me ask the witness. Perhaps we can establish it.

Q Dr. Barrett, you reviewed, I believe, Plaintiffs' Exhibit 5.

THE COURT: Which is what?

MRS. GORDON: I hope I have the right number. A series of regulations by the Department of Civil Service.

THE COURT: That is not 5.

(Counsel confer.)

MR. KANTOR: It is Plaintiffs' Exhibit 13.

MRS. GORDON: I am sorry; Plaintiffs' Exhibit 13. I believe this is it, but it is not terribly important whether it is in here.

Q Let's just assume that under established Civil Service regulations the pass point is one who reaches 70 per cent of the material must pass the examination, that is, that is a matter of law.

Now, that would be an example of some of the

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legal limitations you noted before that might apply to civil service sense that wouldn't apply in an industrial sense, is that correct?

A Yes.

Q Is there a technique in your profession known as the critical incident technique?

A Yes.

Q Is it fair to characterize that technique as one in which a job is examined to determine what behavior contributes or detracts from a given employee's performance?

A Critical incident techniques is generally used as a means of developing an assessment of someone's performance. A typical form has spaces for writing down about an individual positive critical incidents and negative critical incidents.

THE COURT: Does the word "incident" refer to an episode or an event, or does it refer to some aspect of his work?

THE WITNESS: Some specific event. In fact, the form that I can recall has them in blue if they are good, red if they are bad, and there are three red ones and three blue ones. Once we get behind that we stop counting. It is a specific number of activities.

Q It is one type of technique?

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A Yes.

Q The term "critical" as used in that technique, and I believe you used "significant" when you were discussing the nature of what you would look for in a job's nature, significant activities or significant behaviors, the use of those terms doesn't go to a judgment of the type of situation in a lay context, in other words, a critical incident or a significant event is not a riot, is it, it is some element of the job which assists the job analyzer in determining what's important?

A It's really about a person's performance. If during this riot he did something spectacularly good or spectacularly poor, that is written down. If someone else was at the same riot and did nothing good or bad, there would be nothing written down about him.

THE COURT: I don't know if it is important, but Mrs. Gordon seems to be asking about what the word "critical" means.

Does "critical" mean he did something spectacular or the thing in which he did it was spectacular, or both?

THE WITNESS: His behavior. He could do something very good in a non-emergency situation.

Q And when you used the term "significant" before, I trust you were not identifying the term "significant" --

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I trust you were using it as a term of art and not identifying it in terms of some dramatic event, in terms of assessing what is important about the job.

A Yes. The person who is making out the critical incident form is only expected to put down those things that the person did that he observed that were either notably good or notably poor and not to write down those things in the middle which didn't make much difference one way or the other.

Q When a job analyzer or the people from operations look over this kind of a pattern, is it their purpose to form a judgment about what is more or less important to job behavior?

A It depends how it's used. This is one way it's used. One could use the critical incident technique as a means of learning about the job for developing a test and for developing a criterion.

Q Let's assume we have some operations people in corrections who are looking over the job or even looking over a list of critical incidents.

Is it, in your opinion, reasonable for them to determine that at least in this given time and place that areas of the job that they consider to be important would be custody or security or rehabilitation but, say, instead

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of disturbances or riots or things like that?

A I am not sure what you mean by operational people, also the purpose for which they are looking this over.

Q You mentioned your Greenhaven visit briefly. What I am concerned with at this point is how did you know the information you were getting from the people that you interviewed was accurate?

A I didn't. In fact, I knew it was incomplete and I had reason to believe it might not be totally accurate.

THE COURT: To what extent did you feel that you needed to qualify your opinions in the light of those possible deficiencies?

THE WITNESS: As far as a matter of completeness was concerned, I was not allowed to ask things I would ordinarily ask, namely, the relative importance of different kinds of job activities. I was not allowed to ask the training they gave.

THE COURT: Was it explained why you were not allowed to ask that?

THE WITNESS: Not complete. It was a restriction placed by Mrs. Gordon.

MRS. GORDON: Let's get that clear. At the close of our deposition, in fact just prior to the deposition, counsel inquired as to whether the defendants would allow

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Dr. Barrett to visit an institution. We said yes, we would have to get together on some guidelines. At the close of Dr. Barrett's deposition, Mr. Baller tried to establish the guidelines, and, if established satisfactorily, Dr. Barrett would go to the institution.

Is that correct, Mr. Baller?

MR. BALLER: That is correct.

MRS. GORDON: In terms of establishing the guidelines, I stated to Dr. Barrett he could ask anybody he wanted what they did, what they were doing, how long they were doing it, data of that type. I suggested that he not ask subjective types of questions or ask for interpretations of what they were doing.

Now, we have the list of questions that Dr. Barrett did in fact ask, but I don't know that we need go into that.

Q In any event, Doctor, given those guidelines, you did go to Greenhaven, is that right?

A I would say it was more than a suggestion. Mr. Kantor made specific objections to questions I asked.

Q While you were there?

A Yes.

Q I am talking about the guidelines.

A I don't think I finished the second part of the

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question. That is that of the eight people that I interviewed two made some comments about the purpose of my visit which had been explained by Mr. Kantor. One indicated his long personal involvement in the case which was not specified. Another made a rather strong statement to the effect he did not approve of the nature of the case and that he felt this was an unfair sort of activity but then did proceed to answer questions.

I don't know how their expressed opinions or possibly the unexpressed opinions of the other six colored what they said.

Q But you were allowed to go and select whoever you wanted to interview, right?

A Well, in the beginning I had some difficulty with that because there was some question about who I would talk to. We finally agreed I could talk to people on different kinds of jobs. There was no point in my seeing people in Cell Block A and B and C and D, and so forth. Within limits, I was able to select the people.

Q As I say, my primary concern was not the guidelines. You did in fact go. My concern was you did go and how, as a job analyzer, you analyzed that type of situation. I am not going to go through the whole thing but you did mention laws and rules, I believe, on your

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direct examination.

A That's right.

Q One of the questions you did ask to the people was: What laws, rules, regulations do you enforce?

A Yes.

Q Now, I think the chap you mentioned on your direct examination, the one who had been on the job for two days, he said, "I don't enforce any laws, rules and regulations," or something to that effect, is that right?

A I don't recall who said what right now.

Q Let's assume the fellow that you met who had only been on the job two days said, "I don't enforce any," and let's assume another individual you met said yes, he enforces lots of rules and regulations and indeed he has sought an opinion through the Attorney General on keeping open cars in the parking lot and then another one said he enforces them in fights.

How do you assess that kind of information when you are doing a job analysis, if you can? I don't mean to make you give statements about information which you consider incomplete.

A Well, this would certainly lead me to explore this area more thoroughly if I were going to develop a content valid test or laws, rules and regulations and largely

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because I am much concerned about many of the things that they do which are governed by rules and laws but which they do because they are learned like part of the job where other people would learn them even though there were no laws and rules.

Q Right. You wouldn't take a position, would you, that one, an employee would have to know he was enforcing a law at the time he took a particular act, he would just have to know what the substance -- the determinants of his act were?

A Yes.

Q I just have one more question on that. One individual, I think it was this same one that had been on the job two days, when you asked him what he did, he said, "I just float around," or words to that effect?

A Yes.

Q Do you know what the word "float" means in that context?

THE COURT: Do you mean does he know what he means when he used it?

Q Do you have any information to believe that "float" is a word of art in Greenhaven?

A No. I know that a number of people said they are responsible for a geographically defined area and that

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part of their job is to visit various parts of that area. I figured that is what he meant by the term "float."

Q I would like to call your attention to another subject matter area in this line of questions, and that is the construction of the examination, the items themselves.

THE COURT: Are we going to be looking back at 18 and 19?

MRS. GORDON: Yes, your Honor. We are only going to be looking at one. I think it's item 30.

Q Doctor, I ask you to turn to page 8B in your deposition.

A 8B?

Q Yes. At that point in your deposition I think I had asked you why you thought the exam was poorly constructed and you were going through it similarly to how you did with the court this morning, mentioning a few items, and the question is: "Let's continue then. Maybe we will get to that."

"A Question 30. Which one or ones of the following items cannot be consumed by a member of the Muslim faith?

"The answer is pork and alcohol. I don't know why a sergeant needs to know this unless he is the one that's planning the menus in the cafeteria or messhall.

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I am sure if he attempted to give some pork or alcohol to a Muslim the Muslim would let him know.

"Does it make a difference as far as his performance is concerned?

"I can't imagine it does."

Now that you have been to Greenhaven I assume in the course of that visit you have noted that a large segment of the inmate population at Greenhaven is black.

A Yes.

Q Does that observation on your part, and assuming a segment of that population is Muslim, does that change your opinion in any way with respect to the utility of that item, namely, item 30?

A No. As a matter of fact, my visit to Greenhaven makes me conclude it is even less relevant because I found there the sergeant in charge of the messhall is only in charge of the correctional officers in the messhall and in charge of the movement of prisoners into and out of the messhall. The food, menu and purchasing and cooking, and so forth, are not under the guards' jurisdiction or the sergeants' jurisdiction.

THE COURT: I assume you knew before you went to Greenhaven some were black and some were Muslims.

THE WITNESS: Yes, I assumed they were.

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Q I assume from what you say that if you were going to give a content valid examination for mess sergeants that would be an appropriate item.

A I really don't know whether it would or not. It seems to me rather trivial, anyway. They are not going to serve alcohol in a prison, to begin with.

Q Doctor, doesn't the use of that -- doesn't that type of item in your opinion have a higher use? Isn't it perhaps reasonable to think that that type of item is used to try to see if the candidate has some understanding of the mores of the minority groups under his jurisdiction or about to come under his jurisdiction?

A As soon as we do that, Mrs. Gordon, we have to drop the claim that it's content valid, because that's not what we are talking about. If we are talking about understanding the mores of the prisoners, having sympathy for them, and so forth, we are really talking about a construct which we could have defined over a period of time having to do with prisoners' relations and respect for their individuality, religion, and so forth, and then we would have to determine whether this does or does not contribute to their being effective sergeants.

THE COURT: I certainly understand why you believe this to be remote from the central activities of a sergeant, but I am not sure it seems to me it is so clear

it is something that a sergeant doesn't do at all.

Let's say one of his jobs is to check in in the morning. Let's suppose he is supposed to rate a correction officer. That is something he physically does. But in a wide and philosophical sense doesn't he also do understanding with inmates?

THE WITNESS: If we could develop items like that directly, I might say they have content validity. This is so remote from understanding of inmates; people who would know this who live, let's say, in the countries in Northern Africa who had no information about prisons of our kind.

THE COURT: Right. Would it be fair to state as a sort of common denominator with regard to attitudes on this question -- your attitude on this question, the least common denominator, that you regard this answer as being or this question as being a poor one for this examination because the material which it deals with is at least peripheral to the job from your point of view, I guess, and that although it may have more relation to the job of a sergeant that it does to the job of a taxi driver, to whose job it has no relation, it is so minimal that it just didn't make any sense for it to be here?

THE WITNESS: That's right.

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THE COURT: The job relatedness clearly has to be measured relatively rather than absolutely, I take it?

THE WITNESS: Yes, of course.

Q In your direct testimony you called the court's attention to the report prep section starting with question 56 and following to 60, the one that has the series of answers at the bottom, and you indicated that a testwise candidate could really sort of figure out the paragraph without ever reading the sentences, is that the thrust of what you said?

A He would have a start, anyway.

Q He would have a start and then as he goes along, I remember you doing it at your deposition, it gets more difficult because the odds get greater and greater, something like that?

A Yes.

Q Now, did you look at the ethnic item analysis to see whether or not in fact the candidates who answered the question had the same level of testwiseness? I guess that is a fair word.

A There was no way I could do that.

Q Can you tell from the ethnic item analysis, Defendants' Exhibit H, whether or not blacks and whites are going to answer the same answer, right or wrong? Can you

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tell that sort of thing?

A Yes.

THE COURT: Would it reveal anything if you found out with regard to questions 56 through 60 blacks did very poorly or the blacks did very well in comparison to whites?

THE WITNESS: Yes, it would.

Q For example, in terms of testwiseness, wouldn't it matter if there was a spread across the keyed answers?

A I don't understand your question.

Q If a candidate is testwise, wouldn't that make it easier for the candidate to get the right answer?

THE COURT: All the answers.

Q It would be easier for the testwise candidates to get the right answer?

A Yes, it would.

THE COURT: I would rather not leave this hanging. I would rather let Dr. Barrett look at the analysis, the ethnic analysis, of those questions and give us any views he has as to whether they confirm what he stated his opinion is.

Q Just in terms of what it could confirm, I take it from what you stated it wouldn't confirm testwiseness or not confirm it?

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A No, it wouldn't. All it would tell us is whether the blacks --

THE COURT: I suppose it might tell us that it might be consistent with or inconsistent with Dr. Barrett's previously expressed views.

THE WITNESS: Yes, your Honor, but there are so many other things going in the same direction, such as education in general. More than testwiseness, the attitude toward tests. It would be very presumptuous to say any differences that exist here are a matter of testwiseness.

THE COURT: I would like to get the position clear. It isn't clear to me at the moment.

I assume you are asking these questions because you are trying to establish that the answers or the ethnic item analysis of these questions casts some question or might cause Dr. Barrett to cast some questions on his previously expressed views.

He has just said, if I understand him correctly, that he doesn't think it's possible to tell, regardless of what the ethnic item analysis, 56 through 60, shows, just what the reasons are.

Is there anything further you are trying to bring to my attention?

MRS. GORDON: No.

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THE COURT: O.K.

Q In terms of the reliability, Doctor, I think you testified on direct that the reliability of this examination seems to have been judged by the test constructors or made out by the test constructors after the fact.

A Yes.

Q In a civil service jurisdiction, isn't the reliability assessment of a promotion examination necessarily done after the fact? By that I mean after the administration of the examination.

A Yes. You can't tell the reliability of the test until after the test has been given. Probably what Ihad in mind there is this is one of a series of tests. I don't know that reliability was determined for any of the earlier tests along this line. It might have given some clues to the people who were developing the next test in the series which way to go.

Q By that you mean you don't know on the correction officer level, that would be the test before?

A No. I am thinking of earlier tests in the correction sergeant series.

Q Do you mean to imply you don't know whether or not item analysis was done for those tests either for what we have called regular item analysis, that is, non-ethnic,

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or ethnic item analysis?

A I don't know when the state got electronic data processing equipment and when they started to do this.

Q But if you assumed that they were doing item analysis, albeit probably not ethnic item analysis, for a relatively long period, would that be evidence of reliability, in your opinion?

A Not the fact they were doing it. It depends what they found.

Q I didn't quite understand what you mean. What is reliability of an examination in a promotion context in a civil service setting?

A Reliability really means we have a stable measure of something, we don't know what, and that it is likely to be repeatable. If we gave a similar test with different items but constructed along exactly the same principles, we would expect to get approximately the same results from a group of people, that is, the same individuals would give approximately the same results. Or, as Mr. Siegal mentioned, we could analyze one part of the test against other parts of it, the odd numbered items against the even numbered items, to see if it is internally consistent.

Q Mr. Siegal mentioned odd numbers against even numbered and they are used, as you can see from the ethnic

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item analysis, a high. low method, is that correct?

A That's what they did, but then he indicated he did some further analysis. What did he call it? Item reliability index or instability index, something like that.

Q I mentioned that to you in the course of your deposition the day we took it when I gave your attorneys and you that ethnic item analysis. I told you, did I not, that the department maintains reliability indexes and does other standard computational matters with reference to the nature of the item?

A Yes, but to get back to your earlier question, it is not the fact that they did this analysis, what counts is what the results were and what actions they took based on their results.

Q That would mean, wouldn't it, in a promotion context, that when they find bad items or internally inconsistent items, they throw them away, right?

A That would be one thing to do.

Q All right. But you are aware, are you not, that this whole test was all new items?

A What I have been trying to indicate,and I am going back again to what Mr. Siegal said, this is one test in an ongoing series of tests. When we build the next test or they build the next test, whatever it is, there

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should be input from 34944, or whatever the number is, to make that one better based on what we learned this time, and the next one in the series should be even better because of the experience in the other one. If they computed all these statistics and then went ahead and developed the same kind of test, then the fact that they computed the statistics doesn't convince me of anything.

Q But the statistics don't go to the job relatedness of the test, do they?

A They go to the initial construction of the test.

Q I just want to inquire for a moment, you gave the court a number of hypotheses with respect to blacks and whites and their performance on tests. I just want to clarify, at the outset of your discussion where you showed the ovals on the board and you had a group of blacks and a group of whites and you indicated to the court you might have a different cutoff score for blacks and whites which both equally correlated with their performance, you were giving an example of differential validation on a criterion model, were you not?

A That's right.

THE COURT: How does differential validation differ or what is its relation to criterion related validation?

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THE WITNESS: As I understand the question, the difference is that we separate the minority groups out from the non-minority groups and analyze them separately along the same lines to see what differences there may be.

Q By the way, did you compute the item difficulties in 34944?

A No, I didn't.

Q Are there standard computational formulas available for that purpose?

A Yes.

Q Getting back to the hypotheses you offered the court, I drew from what you said that perhaps in a paper and pencil test there is something that inheres which disfavors blacks or possibly disfavors people with less education. Is that correct?

A Yes.

Q Is that true also in a paper and pencil true-false test?

A Oh, yes.

MRS. GORDON: I think that is all, your Honor.

THE COURT: Mr. Baller, do you have any further questions?

MR. BALLER: No questions on redirect.

THE COURT: Thank you very much. Like everybody

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else, it has been very interesting to hear what you had to say.

(Witness excused.)

MRS. GORDON: I have one point. We, as I probably indicated in Dr. Barrett's cross examination, routinely compute item statistics, all of which obviously have not been presented to the court. If it will aid the court at all, I have with me the difficulty levels of the items on the examination, which are simply another column added onto the ethnic item analysis. I have a witness here who can authenticate -- describe the process, if the court wants to hear it. It might help the record. It might be useful later. I would like to put it in.

THE COURT: I think I understand how it's been accomplished. Do you have any questions about that, Mr. Baller?

MR. BALLER: I would gather you just take the ethnic item analysis and find out how many people in the high and low groups put down the keyed answer and how many people put down some other answer and you express it as a percentage or decimal.

MRS. GORDON: That is essentially correct, your Honor.

THE COURT: I don't affirmatively find I would

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want the material, but I don't want to prevent anybody in the post-trial period from putting before me anything they think logically contributes to the questions I have to deal with.

I think the only matter that we have to dispose of at this moment is to be certain that the parties agree as to the authenticity of the material which may or may not be used by them.

MRS. GORDON: Perhaps we can leave it this way, your Honor: should either Mr. Baller want to use such material or I want to use such material, we would exchange it and agree it is appropriately drawn and use it at that time should there be a need.

MR. BALLER: As I see it, the ethnic item analysis is in and if you want to compute percentages, we have nothing to say about it.

MRS. GORDON: That is essentially it.

Thank you, your Honor.

THE COURT: Then both sides rest?

MR. BALLER: Yes, we rest.

MRS. GORDON: Yes, sir.

THE COURT: Happy news.

Ladies and gentlemen, it has been a very -- how can I put it, being honest? This kind of material isn't

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ravingly dramatic. At the same time, to hear what all of you have had to say about the subject is of signal and public importance.

I compliment counsel on their ability, if they did it as recently as I assume, to master the subject of testing as well as they did. I only hope I can master it as effectively when it comes time to render an opinion.

I will see counsel briefly in the robing room to see where we go from here.

(Discussion off the record in robing room.)

(The following occurred in robing room.)

THE COURT: After a robing room discussion, the court set as the date for post-trial memoranda, the filing of post-trial memoranda, three weeks from the date of receipt of the transcript, which is anticipated will be received some time at or around the early part of September.

I would be very pleased to have the trial briefs include, or a separate document accompany them, proposed findings of fact and conclusions of law.

(Discussion off the record.)

THE COURT: As to the claim of plaintiffs for attorneys fees, it has been agreed that plaintiffs' counsel should submit affidavits of service and that the matter of law as to whether or not they are entitled to attorneys

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fees will be handled on papers.

I would like to give back to you your set of copies which has been very useful. You can either give the clerk all the exhibits now or at the time you submit your memoranda.

When did you want to submit your exhibits?

MRS. GORDON: We will submit them in a day or two after we organize them.

THE COURT: All in one package.

MRS. GORDON: Yes.

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